THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, OCTOBER 1, 1875. { Hon. JOHN F. DILLON Contributing Editor.

THE NEW YORK HERALD of Sept. 22, gravely informs its readers in an editorial that "the Supreme Court of the United States delivered its decision yesterday in the cases which came up on appeal from the circuit court relating to the right of a state to tax railway lands granted as a subsidy toward building railroads. The case originated in Nebraska, and it has been decided partly in favor of the state. The Union Pacific Railroad owns, by grant of Congress, alternate sections of land for a distance of twenty miles on each side of its track." The case referred to is that of McShane v. The Union Pacific Railroad, decided last winter and published by us at the time (*ante*, p. 104). Synopses of these old decisions are still being telegraphed to the New York dailies as though they had just been decided. It is a disgrace to journalism and an imposition upon the public.

HON. WILLIAM BEACH LAWRENCE, we learn from the Legal Gazette, has been during the past summer engaged on his *Commentaires*, the publication of which had been discontinued. The Gazette relates the following concerning a large fee taken by Mr. Lawrence:

"It was a natural effect of Mr. Lawrence's reputation abroad, that though he had not practiced law for forty years, the owners of the Circassian, when they were endeavoring to reverse, in 1873, before the Joint High Commissioners, the decree of the Supreme Court of the United States, which had condemned her for violation of our blockade, sought his aid as their counsel. A conviction previously, publicly expressed by him, that the condemnation was in violation of the law of nations, and a proffered fee of $40,000 *in gold*, induced him to argue the case. He argued it and gained it and got his fee, his $40,000 *in gold!*—not a bad fee for the season of the panic!"

LIFE INSURANCE LEGISLATION.—Referring to the subjects discussed in the convention of life insurance commissioners which recently met in New York, the Indianapolis Sentinel makes the following suggestions, which we reproduce, as showing the tendency of public sentiment on the question. We expressed our views on it two weeks ago:

In the matter of life insurance there is a great necessity for general legislation on one point, and that is on the lapsing of policies by reason of failure to pay the annual premium on the policy. Whenever a single premium on a policy is paid, there is invested in the policy holder, in theory, a right to a certain amount of money at death. No matter whether another premium is paid or not, he has a right to a proportional amount of the original pledge of the company. If this proposition is not true, there is no way in justice of denying the right of the policy-holder to demand the refunding of his premium money, since the company has received something absolutely for nothing. Legislation should therefore provide that every company should immediately upon the failure of a policy-holder to pay his annual premium, issue to the holder a paid-up policy for an amount proportional to the expectation of life, which regulated the amount of the premium paid. In some of the states where companies are chartered this is required, and should be demanded by every state of all foreign companies doing business in their lines. The matter of misrepresentation by agents is a grievous evil, but it is doubtful whether special legislation could reach this particular business, any more than it could reach a disposition to lie discovered in other business occupations.

THE INSURANCE COMMISSIONERS of the different states have recently been in covention in New York. The main feature of the meeting was the speech of Mr. Finch, of Indiana. His utterances were of a decided character, such as might be inferred from a synopsis of his views published by us two weeks ago (*ante*, p. 602). His positions have been variously criticised, the New York World being very severe toward them, while the New York Tribune and Saint Louis Republican speak in tones of moderate approbation. The Indianapolis Sentinel wisely says:

The insurance business has become one of the great interests of the country. A vast amount of money is invested in it, and all wise business men secure its protection. It has become a necessity, inasmuch as the credit of a firm is often secured or impaired by taking of advantage or neglecting this safeguard against the accidental loss to which all are more or less exposed, and therefore, it will not do to disparage insurance as a legitimate and useful occupation, or denounce those engaged in it as extortioners and unworthy of confidence.

The truth is, that public sentiment is running into a spasm of insanity on this question, as it does on some others, and this is more particularly true of life insurance. Instead of looking upon life insurance corporations as *trustees* of funds which should be sacredly preserved and guarded for the benefit of the widows and children for whose security it is being treasured up, it is regarded as so much money in the hands of a heartless set of adventurers, which is to be plundered whenever opportunity offers. The average juror, whose mind is incapable of any extensive process of ratiocination, reasons the question about this way: "An insurance company is a corporation; it is therefore 'bloated'; it is a vampire which sucks the blood of the honest sons of toil; it is a gigantic monopoly, holding in its coffers all the money in the country, and grinding the people in the dust." With such feelings, he may easily satisfy his conscience in awarding a verdict against an insurance company on a policy, no matter how base the fraud by which it may have been obtained. The fact is, whether the manner in which the business of life insurance is conducted be honest or dishonest, the assets of such a company do not, except in a limited sense, belong to the officers and agents of it, but belong to the beneficiaries in their policies, for whom it is held in trust by the corporation; and every suit on a policy of life insurance should be regarded rather as a contest between the beneficiaries in one policy, and the beneficiaries in all the other policies of the company; just as a suit between an assignee in bankruptcy and a creditor, is a suit between that creditor and all the other creditors, represented by the assignee.

MOB LAW.—On Saturday last at Bellefontaine, Ohio, a man named Shell was lynched by a body of excited citizens, who supposed him guilty of ravishing and then murdering a girl named Alice Laughlin. The verdict of the citizens was formed almost entirely on the testimony of the wife of Shell, given at the coroner's inquest after the husband had been arrested and imprisoned. The story told by Mrs. Shell is extremely improbable, and points to the conclusion that she herself had committed the murder through jealousy, and then, to save herself, had accused her husband. However this may be, the occasion is a fit one for enquiring the remedy for the frequent

occurrences of this kind that are taking place in different parts of the country. Beyond doubt the seat of the disease is a general distrust in the administration of criminal justice. In this case there was good ground for such distrust. A questionable rule of the common law makes a husband and wife one person, and prohibits the one from testifying against the other. Therefore, unless this rule has been abrogated in Ohio (and we suppose it has not), the testimony of Mrs. Shell would not have been available on the trial of the cause. This consideration, no doubt, had its weight in moving the citizens with the impulse that justice should have her dues speedily and surely.

The circumstances which lead to the supposition that Mrs. Shell, and not her husband, was guilty of the murder, consist in the fact, as stated in one of the newspaper accounts of the affair, that in the hand of the dead girl, tightly clenched, has been found some threads of hair. In her death struggle with the enemy she had torn these from the roots, and held them like a vise. The hair was fine, dark and straight. They were supposed at first to be from Shell's head, but on examination under the microscope they appeared darker and coarser for his own hair was uncommonly fine, and what settled the matter as to Shell, the hair ranged from ten to fourteen inches in length, and no hair in his head measured half that. Besides the hair of the deceased was of a dark auburn and fine in texture, while this hair was the exact counterpart of the hair of Mrs. Shell.

Such law as that administered in this case is but one step better than no law at all, and finds its only justification in communities such as mining camps remote from civilization, where no other law can be invoked. And law administered by twelve unskilled men, played upon by cunning advocates, is but one step better.

The Defence of Insanity.

"They do things better in France," or worse, according to the varying notions of what is better and what is worse. A French jury recently found a prisoner guilty of murder without mitigating circumstances, who certainly would have been acquitted by an American jury, and then perhaps banqueted by the public. "The prisoner in question," says an exchange, "who was named Berges, a workman at Toulouse, shot and killed three men in open daylight on the 24th of October last, and severely injured a fourth, finishing with a desperate attempt at suicide. The evidence given at the trial is interesting, both from the point of view of English experience, and also as showing that French juries do not on every occasion grasp at the shadow of an extenuating circumstance. Berges' own account in court was that he was induced to kill Naudy because he sent evil spirits to annoy him. He killed Lasbax because he found him talking with Naudy. Caussinius had once accused him of indecent behavior towards a neighbor's daughter; and Vergnes had interfered with his poaching proclivities. He describes his having been spell-bound by a beautiful woman, radiant as a princess, and said the night before he committed the murders he heard noises around the house, and heard the voice of Naudy as he dug with a pickaxe outside. He had, to cure himself of his malady, shaken hands with all his friends, in order, he said, to get rid of the venom. Forty-eight witnesses were examined, most of whom stated that Berges was not considered out of his mind, but that he was very passionate. Some, however, gave evidence that Berges had complained of violent headaches, and that he declared Naudy had sent evil spirits to torment him. Others testified that Berges shook hands with them in a strange way, and afterwards asked them what sensations they had felt. Five doctors accustomed to deal with lunatics declarged Berges to be out of his mind, and recommended his instant removal to an asylum. A sixth, who had examined him, sent an affidavit stating that if Berges was not mad he had, at least, committed the crimes of which he was accused while in a state of high fever. The jury, as we have said, refused to be influenced by this evidence, and Berges was condemned to death." If American juries would only administer the law in clear cases, there would be a rapid decrease in insanity in this country.

An International Tribunal.

Dr. James B. Miles read before the recent meeting of the Association for the Reform and Codification of the Law of Nations a second paper on this subject, his first paper having been read before the meeting which took place last year at Geneva. This second paper is devoted to an attempt to show the grounds for confidence in the effectiveness of the decisions of the proposed tribunal. The present paper does not acquaint us with the most important premiss in such a discussion, but it argues that the exalted character of the court itself and considerations of *honor* and of *patriotism*, would lead to an acquiescence in its decrees.

Much as we should like to see a trial of the experiment of a tribunal of this character for the settlement of disputes between nations, and strongly as we sympathise with the general purposes of the Association which has honored Dr. Miles by making him its general secretary, yet we feel obliged to say that we are not favorably impressed with the arguments he puts forth in favor of this measure. On the other hand they impress us with the notion of an enthusiast who has an idea in which his affections are so concentrated that he is incapable of seeing any of the obstacles in the way of its attainment. A paper which, in discussing a question of such gravity and difficulty, takes such roseate views of human progress as this does, and which presents its arguments dressed in the florid garb of a school girl's composition, will only move laughter on the part of statesmen and diplomatists, and can not but have a tendency to bring the whole subject into ridicule. Imagine, for instance, the effect of such an argument as the following upon the mind of Prince Bismark or Gortschakoff:

It is a question of profound interest—Are the foremost nations to-day sufficiently enlightened, are they far enough advanced in the development of reason, conscience and the high moral sentiments, in the sense of the good, the beautiful, the just and the true? Is there among them intelligence, wisdom, virtue, magnanimity, statesmanship enough to capacitate them for the lofty undertaking of the constitution of an International Tribunal? We may be too sanguine, we may think of them more highly than we ought to think, and yet we can but answer, yes. We ask attention to the wonderful progress made by these nations in all that constitutes a true civilization during the last half century. It has been a period of unprecedented mental activity. The nations have been snapping the fetters and casting off the shackles of ignorance and barbarism. By their conquest of the elements and forces of nature, and by making them the servants of man, they have been winning victories more brilliant than those of the battlefield. By marvelous discoveries in astronomy, in geology, in philology, in all departments of science and knowledge, what immense

additions they have made to the world's intellectual stores! The genius of man has actually climbed the heavens and weighed the sun and whirling planets in a scale. It has dived down into the depths of earth and ocean, and brought to light secrets that have been hidden for ages. It has tunneled the mountains and bridged the rivers and chasms. It has underrun oceans with submarine cables and overrun continents with electric wires, and sent out its line through all the earth, and its words to the end of the world. It has sent strong and swift ships to and fro over all waters, which like shuttles in the loom of time have been weaving the nations into one.

Dr. Miles imagines that the character of the court would necessarily be so exalted and irreproachable that its decisions would command the acquiescence of the nations. He says:

A second reason for confidence in the effectiveness of the decisions of the International Court, is afforded by the *composition* and the *character* of the court The tribunal for which we contend, and which we believe is demaned, is to be composed of members chosen from each one of the nations associated in the confederacy. And, although, the relative size and power of the nations may differ much, yet we maintain that each nation should have the same number of representatives in the court, for the interests, the rights and the honor of the weaker nations, as of weaker individuals, are equally sacred, and entitled to protection with those of the stronger individuals and nations. The number of judges to be selected from each nation, we will not pretend to determine but the analogy of two senators from each state of the American confederacy, regardless of the size of the states, naturally inclines us to say, let two judges be appointed by each nation. Such is to be the tribunal in its composition. And, then, as regards its character, it is to be *judicial*, a court of law, whose prerogative it is to determine what the law is in its impartiality and majesty, in its application to all nations at all times. It is to be a court of law in distinction from a court of umpires, or arbitrators appointed by parties in controversy to decide upon an existing dispute, and the judges are to be jurists and publicists, the ablest, the wisest, the most fair-minded to be found in each nation.

In the next sentence, his enthusiasm carries him to the verge of blasphemy:

Thus the tribunal will be literally a *High Court*, the most august judicatory upon earth, so lifted above, and shielded from the influence of partisan and selfish considerations, envy and jealousy, as to be the best earthly embodiment of exact and even-handed justice, presenting no unworthy resemblance to the tribunal of Infinite Justice.

Now, it is by no means certain that such a tribunal would be of the exalted character here suggested. It is by no means certain that it would be composed of "jurists and publicists the ablest the wisest and most fair-minded to be found in each nation." It is not improbable that some of the nations would esteem their interests much safer if represented in such a tribunal by cunning diplomatists rather than by impartial jurists; and the President of the United States would be about as apt to give such a place to some of his old friends or to needy politicians, without any special regard for their fitness, as to give it to Caleb Cushing or Reverdy Johnson. To carry certain points, nations are not unwilling to engage in wars which involve the expenditure of hundreds of millions of dollars. To carry such a point, would an unscrupulous minister hesitate to offer bribes so enormous that even the members of so exaulted a tribunal might not be able to withstand the temptation? Such a court, therefore, instead of "presenting no unworthy resemblance to the tribunal of Infinite Justice," might degenerate into a mere theater of diplomatic chicane and corruption.

Dr. Miles argues strongly that the sentiment of *honor* would induce nations, when they had submitted their grievances to this tribunal to abide by the result. This sentiment, he argues, is stronger than life itself, and is no less strong in nations than in individuals. And in proof of this he instances the suddenness with which a nation will spring to arms to avenge an insult to its flag. It is true that the particular species of honor which moves nations to act thus, exerts a powerful influence upon their character. But this honor is the honor of the bully and the duelist, and has no necessary connection with *honesty*. A nation may be thoroughly imbued with this kind of honor, may strut and crow among the other nations, and, like a great baby, look constantly around to see if some of them will not knock a chip off its shoulder; and yet its foreign policy may be utterly destitute of any principle of honesty and justice. For instance, there was much "*honneur*," but how much *honesty* was there, in the motives which impelled Napoleon III. to declare war against Germany in 1870? And how much honesty did Russia exhibit soon after, when France was down and the heel of Germany was upon her neck, in coolly repudiating the solemn treaty which restricted its navel armament in the Black Sea? The greatest diplomatist said that words were made to conceal ideas. The very name diplomacy is synonymous with falsehood and trickery. Nations in their conduct with each other are influenced infinitely less by considerations of honesty and justice than individuals are in their private dealings. Any expectation, therefore, that the more powerful nations would submit to the judgments of such a tribunal as Dr. Miles indicates, would probably prove vain and illusive.

Those nations whose policy is aggressive will never submit their grievances to such a tribunal. But the policy of all great nations is aggressive; therefore the great nations will never enter into such an arrangement. A tribunal supported only by such powers as Holland, Belgium and Switzerland—powers which are patiently expecting the day when they will be swallowed up—would be unable to exert any substantial influence or to make itself in any considerable degree useful.

Association for the Reform and Codification of the Law of Nations.

REPORT OF THE COMMITTEE ON BILLS OF EXCHANGE.*

At the Second Annual Conference, held at Geneva last year, in view of the number of questions relating to Private International Law, which all more or less come within the scope and objects of the Association, it was determined that subjects coming under this class should be dealt with separately. Accordingly, at the last Conference, as stated in the circular-letter issued in March of this year, the Council determined to direct attention primarily to the following subjects:—

1. Bills of Exchange; 2. Foreign Judgments; 3. Copyright; 4. Patent Law; 5. Trade-Marks. And to the consideration of the existing state of the law in different countries on these questions, and the best plan for adopting some systematic mode of obviating the conflicts existing with regard thereto.

This committee, after mature consideration, felt the necessity of devoting attention to these subjects, one, by one.

In the belief that no question affects so large a section of the commercial community as that of bills of exchange, and that public opinion is already ripe, seriously to consider the importance of the assimilation of the laws and practice relating thereto, this committee determined that its first efforts should be directed to the best mode of bringing about a uniform system of law and custom in regard thereto.

With this view, it was deemed essential to seek the opin-

*The committee consisted of Sir Thomas Travers Twiss, Q. C., F. R. S.; Joseph Brown, Q. C.; Henry D. Jencken, Esq., and J. Rand Bailey, Esq.

ions of chambers of commerce, bankers, jurists and others, in various countries, alike as to the difficulties now found to exist, and the best method of providing a remedy.

Mr. H. D. Jencken, and Mr. J. Rand Bailey, were then instructed to frame a series of questions, and to circulate them in the different countries of Europe.

Ten thousand copies in the English, German, and French languages, have been circulated among the chambers of commerce, bankers, jurists and leading mercantile houses in England, America, Europe and other countries.

The questions thus submitted, have elicited replies and expressions of opinion from jurists, chambers of commerce, bankers and merchants, in the following countries:—

GREAT BRITIAN.—From R. Hingston; the Merchant and Traders' Association of Nottingham; the Cardiff Chamber of Commerce; the Chamber of Commerce of Greenock, and others.

These answers approve of uniformity in the form of bills of exchange, and the desirability of abolishing usances and days of grace, but do not touch upon the other points.

The Greenock Chamber of Commerce recommends the Scotch system of protest, and the recording in the court, within six months of such protest, which has the effect of a judgment decree against the parties to a bill of exchange.

FRANCE.—From the Chamber of Commerce at Dunkerque, to which special attention is directed, also from M. L. Oudin, Henri Becker and others. The answers given recommend uniformity in the form of bills of exchange; the abolition of endorsements in blanks; uniformity of stamp; abolition of days of grace and usances; a fixed *ad valorem* commission in lieu of the present charges of protest; uniformity of time of prescription. A useful suggestion likewise is made, "that no endorsement should be valid unless the postal address of the endorser be written on the bill itself."

GERMANY.—The replies received from Germany, deal more thoroughly with the points submitted in the questions.

The Chamber of Commerce of Lubeck; that of Breslau; the answers received from Dr. Borchardt of Berlin, from Herrn Gernaud of Mannheim, Dr. Strauss of Vienna, Herrn G. Lederer of Carlsbad, M. Jansen of Cologne, the Vorsteher-Amt der Kaufmannschaft zu Danzig, and the Handels-Verein in Giesen and others, embody a vast amount of useful information.

The replies unanimously disapprove of the adoption of a universal form for bills of exchange, but they suggest to add the words "*bill of exchange*," on the face of the instrument, and to omit the word *valuta* or value. In regard to *endorsement*, the rules laid down in the Allg. Deutsche Wechsel-Ordnung, Arts. 9–17, are recommended; also that *usances* and *days of grace* should be abolished. In matters of notice of dishoner, protest and presentation, the rules of the Allg. Deutsche Wechsel-Ordnung, are recommended.

The cost of protest in Germany, is stated not to be in any way onerous. The schedule to the Danzig Report, contains a complete statement of the charges in Germany.

The answers suggests a uniform scale of charges as desirable, but add that this is not practicable.

The use of the *Aval* is recommended.

They further recommend, that a *bona fide* holder should in all events be protected; that carelessness or wrongful acquisition on the part of the prior holder should not invalidate the title of a *bona fide* holder for value; that the Allg. Deutsche Wechsel-Ordnung and the German *Novels*, be taken as the model upon which to formulate a general system of international law for bills of exchange.

In regard to prescription, the answers furnished are as follows:—

In the Rhine Provinces the time of limitation is three years as against the acceptor; three months against other parties to the bill; six months if drawn from Africa or Asia (Mediterranean coast); eighteen months from the Colonies. On comparing these periods with those required by the laws of France, Holland, and England, the utmost diversity becomes manifest. The periods vary from three months to thirty years.

The answers further recommend that weekly notice in the case of letters of credit should be given to the party issuing these documents.

Other differences are noticed. Thus, the German law does not require the word *valuta* (value) to appear on the face o the bill of exchange; whilst the French law makes this imperative.

The answers further recommend that attachment should issue in case of dishonor, on the property of the defaulting parties to a bill lost, after protest.

They further recommend the abolishing of stamps, save in the case of protest; and recommend that a uniformity as to prescription or time of limitation of actions, should prevail in all countries.

The committee desire to make special mention of the answers furnished by Dr. Borchardt, one of the Vice-Presidents for Germany, and to the resolutions of Dr. Jacques of Vienna, in regard to the international codification of the law of bills of exchange, submitted to the German Juristentag, 1872, and reported by Dr. Borchardt in a publication entitled, "Wochenschrift fur Deutsches Handels-und Wechselrecht" No. 40).

The resolutions referred to are as follows:—

"The German Juristentag declares as their opinion—

"That the establishing of a common law on bills of exchange for all the states of Europe, as well as those of North America, is desirable, and that such codification is consonant with the scientific advancement of modern days, having become a matter of necessity in the interests of international trade and credit."

Similar resolutions were passed in the meeting of jurists in Copenhagen (22d and 29th August, 1872), and in the meeting of the Juristentag of Hungary (1870).

In the above-named communication, the following points many of which were fully discussed at those meetings), are touched upon, following the Nos. of the questions:—

First. The desirability that the laws regarding bills of exchange should be assimilated.

Second. That it is not expedient or practicable, however desirable, that a bill of exchange should be worded in a definite, stereotyped form; that certain rules should, however, be observed; that the extreme laxity of the law of England, and of that of the United States of North America, in regard to the form of the instrument, is productive of great mischief.

Third. That it would be difficult to fix upon one uniform value of stamp; that as endorsement in blank has become of universal adoption, save in those countries which follow the French Code de Commerce, no form of endorsement can be established; and that to restrict special endorsements, would be highly impolitic.

Nos. Five and Six. That days of grace and usances are all but done away with in Germany, and that they ought to be abolished; that, however, days of delay might with advantage be granted to the holder before causing protest to be made.

No. Seven. That in case of dishonor for non-acceptance, security and not payment, shall be demandable.

Eight. Notice is not obligatory in Germany, as it is in England and the United States.

Nine. Dr. Borchardt adds further, that the cost of protest, and the rate of re-exchange, are not within the sphere of the laws proper relating to bills of exchange.

Ten. Eleven. He strongly recommends one uniform time or period of prescription.

Twelve. And that in regard to the *Aval*, that defences or all pleas based on the *benificium*, be disallowed.

Thirteen. In the event of loss, it is suggested that the cancelling of the last document shall take place by order of a competent court (amortization by judicial proceedings). Forgery cancels all contracts based on the forged signature, but can not in any way affect innocent holders.

Dr. Borchardt also recommends protest before two known residents (householders), in the absence of a notary or huissier, and further draws attention to the important question of *vis major*, recommending that only objective difficulties, insurmountable in their nature, such as floods, blockades, siege, etc., shall give the right to claim extension of time.

Replies have also been received from Sweden. A valuable document has been contributed by the Mayor of Gothenburg, and principally deals with the following questions:—

First. That merchant custom is not in force in Sweden as in other countries, so far as bills of exchange are concerned.

Second. That uniformity in the form of a bill of exchange is highly desirable; the difficulty, however, as to the adoption of the best form being very great—all but insurmountable.

Third. That no stamp is required on bills drawn in Sweden; but on legal process, issuing the tax is ¼ per cent., save in bankruptcy, in which case no duty is imposed.

Fifth, Sixth. That usances and days of grace are abolished by the law of Sweden. Formerly the Reichbank held the privilege of claiming two months' days of grace in case of war, or frost, or for other reason.

Eight. That the law of Sweden, following the German law, does not require notice to be given.

Ninth. But that protest is necessary, the cost of protest being very trifling (a schedule of costs being appended).

That no difference is made between inland and foreign bills of exchange, which it is understood is the rule in England.

That proceedings may be taken against all or any of the parties to the bill on dishonor for non-acceptance or non-payment.

To preserve the rights of a holder of a bill of exchange, proceedings must be taken, in the case of a bill drawn and accepted in Sweden, within three months; if in foreign countries (European), within six months; if drawn in one of the colonies, twelve months. But as against the acceptor, the time of prescription is three years. These limitations refer to proceedings on the bill itself. The ten years' prescription applies to those cases in which the holder has not proceeded on the bill, but on the debt.

Twelfth. The *Aval* is legally recognized by the law of Sweden, and although not greatly in use, is recommended.

The committee further report, that from the Netherlands answers have been received from A. J. Hory, advocate, of Amsterdam; also from M. D. Polak Daniels, of the Hague. These replies may be summarised as follows:—

First. That the diversity of the laws in regard to bills of exchange, is such as to render the consideration of the assimilation of the laws, a matter of importance.

Second. That one form and one system of laws should prevail.

Third. That a fixed *ad valorem* rate of stamp duty should be agreed to.

Fourth. That one common form of endorsement and one uniform law in regard to a holder for value, should be established.

Fifth, Sixth. That in case of their continuance, uniformity of usances and of days of grace be established, and that protest should in all cases be made within three days from the maturity of a bill of exchange.

Seventh. That protest before two witnesses be allowed in the absence of a notary.

Ninth. That protest only is required by the law of Holland; that notice is not obligatory.

Tenth. That by the law of Holland, the rights and remedies by, and against parties to a bill, are limited by the *civil law* to thirty years, and by the commercial law to ten years, as against the acceptor; but as against the other parties, the limitation is twelve, fifteen and eighteen months, according to the *distancia loci*.

In the case of checques, or mandates to pay a sum of money, the limit of time is ten days.

Twelfth. That the *Aval* is by the law of Holland in force but rarely used.

Thirteenth. That a *bona fide* holder for value, is in all events protected; that the law of Holland does not allow questions of diligence, carelessness, cause of loss, etc., to be raised; that upon security being given, the former holder of a lost bill may demand payment (demortization of the lost acceptance).

Replies have also been received from the United States of America (W. F. Hill and W. M. Cohn, of Little Rock, Arkansas). These answers affirm the desirablity of a code, and also of a universal form of a bill of exchange, of endorsement; recommend abolishing usances and days of grace; also uniformity in the time and mode of presentation.

In regard to notice a uniformaity of form is suggested; protest is regarded as the surest mode of proving notice.

The scale of charges on protest are stated to be moderate; the scale of charges for exchange and liquidated damages is likewise given; these vary from 2 per cent. to 10 per cent, carrying 10 per cent. interest.

An important rule (Dig. 1874, pp. 231, 232), contained in the laws of that state, is that the holder has no remedy unless he has given value.

Five years is stated as the limit of time for bringing actions, uniformity of period of prescription being recommended.

The committee after mature consideration of the answers received, and of the valuable suggestions with which many eminent jurists have favored this association, have arrived at the following conclusions:—

They concur in the opinions expressed of the meeting of jurists (*Juristen-Tag*), held in the year 1870, and representing Hungary and the Sclavonic provinces of Austria, and the further meeting held in August, 1872, in Copenhagen, at which all Scandinavia was represented, as also Germany and Austria. Those opinions, as expressed in certain resolutions passed in these meetings, are as follows:—

"That it is highly desirable that one uniform system of laws with regard to bills of exchange should be adopted.

"That the example of Germany should be followed, which country assimilated the laws of the different states of Germany, forty in number, after a labor of nearly fourteen years."

The committee beg to express their concurrence in the views thus stated. Upon the several points raised by the questions submitted and herein referred to, the committee have to report as follows:—

1. That a uniform expression of opinion has been elicited from jurists, merchants, and bankers from all parts of the world, both in the answers given, and by correspondence; that is highly desirable that an international code for all countries regulating the laws, practice, and customs of bills of exchange should be established; and in which views your committee concur.

2. That as regards uniformity in the form of a bill of exchange, great diversity of opinion exists; that the German, including the Austrian and Dutch jurists have pointed out the danger of a statutable (stereotyped) form; they recommend, however, the adoption of the rule that the words "Bill of Exchange" should appear on the face of the instrument, comformably with the 4th article of Allgemeine Deutsche Wechsel-Ordnung.

Your committee concur in this view, and do not recommend a given stereotyped form created by statute law to be established for bills of exchange. They recommend that the distinctions between inland and foreign bills observed in England be abolished; also that the payee of a bill of exchange may be the drawer himself.

That the opinions are opposed to bills payable to bearer; and that in view of the diversity of opinions, the committee refrain from expressing any decided view.

3. That as regards the stamp or dues payable upon a bill of exchange or promissory note, your committee think that this question is not within the province for juridcal discussion; that, however, an International Conference, authorized by the different countries, might be held, to determine a uniform rate, analogous to the recent conferences on postal regulations.

4. The greatest diversity of opinion, it appears, exists between the jurists of different countries in regard to the form of the endorsement of bills of exchange. As a rule, all the laws of those countries which have adopted the Code Napoleon, forbid blank endorsements, and require that the date, name, and consideration be expressed. The committee, in view of the great difficulties involved in this question, confine themselves to recommending the adoption of endorsements in blank; they suggest, however, agreeing with the Dutch and French answers, that each endorsement should be accompanied by the postal address of the endorser.

5 and 6. The universal opinion appears in favor of abolishing usances and of days of grace, in which opinion your committee concur.

7. In regard to the time and mode of presentation for acceptance, the opinions vary greatly. As regards the presentation of a bill drawn at sight, the opinions of all favor the presentation for payment or acceptance within a limited time of three months if drawn in any of the European states; six months if drawn in other continents.

8. Notice of dishonor is, as a rule, not obligatory by the laws of France, Germany, Sweden, Holland and Russia, whilst by the law of England and that of the United States notice is necessary. Having regard to the saving of costs, the committee recommend notice of dishonor in lieu of protest, to be followed by legal proceedings within a given period. In making this suggestion they desire to state that they are fully aware that the laws of France, Germany, Sweden, and, in fact of all other countries, regard protest as necessary. The practice and mode of giving notice or making protest is a matter essentially local, and is not, it is thought, a subject for discussion.

9. The use of protest is all but universal, and only in the case of inland bills does the law of England permit any exception. The committee hence recommend that protest should be necessary before legal proceedings are commended; that a scale of charges, varying according to the nominal value of the bill, be adopted.

The German law on bills of exchange, and the Swedish and Austrian laws comprise schedules of charges, which are based on a very moderate scale. The committee suggest for consideration the following tariff:—

For all bills of exchange under £40, ¼ per cent.

For £40, and under 400, ⅜ per cent.

For £400 and upwards, 1-10 per cent.

10. The rights and remedies of parties to a bill of exchange vary greatly in different countries, and the opinions elicited differ as widely. Your committee abstain for that reason from expressing any definite opinion, until these matters have been more fully discussed.

They venture, however, to suggest as follows:—

a. That one single action should, following the law of England, be aliowed against all the parties liable upon a bill of exchange.

b. That it shall be obligatory to exercise the right of election against any of the parties to a bill of exchange within one year from date of protest.

a. That the rules laid down by the law of Belgium, May 1872, be recommended as a useful basis for a uniform law in this respect.

11. In regard to limitations of actions (prescription) the general opinion appears to be that one uniform period should be adopted. Your committee recommend that three years as

against the acceptor, and one year as against the other parties, be adopted. In making this recommendation they are following the rules of the German, Austrian, and Swedish law.

12. The *Aval*, or floating guarantee, unknown to the law of England, but generally adopted in other countries, is an important, and, for the purpose of British trade, may be a useful accompaniment to a bill of exchange. Your committee think, hence, that this form of security ought to be adopted by the law of England, and that the rule, as laid down in the French Code de Commerce, ought to be accepted as the guide in framing an Act of Parliament in regard to this instrument.

13. In regard to lost bills of exchange, the universal opinion appears to be that the rights of a *bona fide* holder for value should not in any way be subject to attack; that the holder should only be put to his proof upon evidence of fraud or gross bad faith.

Your committee recommend that a uniformity of practice be adopted in case of the loss of a bill of exchange, and they recommend the rules contained in the Belgium law of May, 1872 (Arts. 39 and 48) as a precedent.

In regard to letters of credit, circular notes, and their loss through carelessness, and likewise the commission of forgeries on bankers in consequence of such instruments falling into wrong hands, your committee think that the data furnished have not been explicit enough to enable them to form any definite opinion.

Other and important questions have been raised by Dr. Borchardt, by the Swedish, Dutch, and Belgian jurists, in regard to *vis major*.

It appears that the greatest abuse was made of the right to plead *force majeur* during the late French war. Your committee concur with the opinion expressed by these jurists that the *vis major* ought only in such cases be allowed to be pleaded by way of defence where an objective hindrance has arisen, such as floods, actual state of seige; and that a limit of time, even in these cases, be fixed by law.

Your committee have also to report that attention has been drawn to the following matters, which have not been touched upon in the answers.

And, firstly, as to the consideration. By the French Code de Commerce and the English law, consideration underlies the contract based upon a bill of exchange, whilst the German law is silent, and treats the question as a matter of estoppel; the bill itself, like a deed, supports the consideration.

Further, the capacity to contract, and in whose favor and to what extent the *beneficium* should be applicable; the distinction between trader and non-trader, all these questions bring forward the more intricate matters which relate to domicil.

Your committee, in deference to those who have in their communications made mention of these questions, allude to them; as also to the complicated questions regarding security upon dishonor, intervention, the rights of parties intervening, and their legal position.

Other points, such as Solidarité, Cession, overdue bills, and the equities attaching, can only be named, for your committee do not desire to go further than the limits indicated by the questions.

In conclusion your committee suggest that the Allegemeine Deutsche Wechsel-Ordnung, and the German *Novels*, and the Belgian Law of May, 1872, might be employed with great advantage in formulating a draft act or law (*projet de loi*) and that any points of conflict between the law of England and these recent enactments of these two countries are quite within the scope of practical reform.

Your committee refrain from suggesting any definite propositions of reform; they feel that in the present state of enquiry the proper course to pursue is, in the first instance, to consider and to discuss the various points of difference, and, once having determined on these, to constitute an international committee, who would frame a report for the next ensuing conference, embodying a draft outline of an international code for bills of exchange, promissory notes, and other negotiable securities, which range under the head of *Letters de change*.

LONDON, 10 Old Square, Lincoln's Inn,
31st August, 1875.

Contributory Negligence—Effect of Employee Notifying Superintendent of Defective Switch.

PATTERSON v. PITTSBURGH AND CONNELLSVILLE RAILROAD COMPANY.*

Supreme Court of Pennsylvania, January 13, 1875.

An employee upon a railroad was thrown from a car and injured, owing to a defect in the construction of a switch. In an action against the company the plaintiff offered to prove that he had notified both the foreman and the superintendent of the road, of the defective condition of the switch; that they had promised to have the necessary repairs made, and had requested the plaintiff to continue the use of the switch, exercising due care; that the repairs were not made prior to the accident, and that in consequence of such neglect he had sustained his present injuries. The court below refused to admit the offer. *Held* (reversing the judgment of the court below), that the evidence should have been admitted.

Error to the District Court of Allegheny county.

This was an action on the case, brought by an employee of the defendant railroad company, to recover damages for injuries sustained while in the service of the company. The jury having been sworn to try the case, the plaintiff was called upon by defendants' counsel to submit in writing the substance of the evidence on which he relied. The offer of this evidence (which is set out at length in the opinion of the supreme court), when made, was objected to; the court below (Hampton, P. J.) sustained the objection, and the jury was instructed to find for the defendants. The plaintiff took a writ of error, and assigned for error the rejection of the offer of evidence by the court below.

W. S Miller and *R. B. Carnahan*, for the plaintiff in error.

The hazards arising from the defective switch were not necessarily incident to the plaintiff's employment, and the offered evidence shows that they were not voluntarily assumed by him. Plaintiff continued to perform this service because requested so to do, and under a promise that the cause of the increased hazards of the employment would be removed.

Plaintiff exhibited due care, and the simple act of complying with defendants' request to continue the employment, can not be set up as contributory negligence. Clark v. Holmes, 7 Hurl. and Nor. Ex. Rep. 937; Snow v. Housatonic Railroad Company, 8 Allen, 441.

"The master is bound to use ordinary care in providing suitable structures, engines, tools and apparatus, and in selecting proper servants, and is liable to other servants in the same employment if they are injured by his own neglect of duty, and it makes no difference whether the master is an individual or a corporation."

*From the Report in 1 Weekly Notes of Cases, 1569 (Phila.: Kay & Bro.)

Caldwell v. Brown, 3 P. F. Smith, 453; O'Donnell v. The Allegheny Valley Railroad Company. 9 Id. 239; Weger v. The Penna Railroad Company, 5 Id. 465; Frazier v. The Penna. Railroad Company, 2 Wright, 111; Railroad Company v. Barber, 5 Ohio, 541; McMillan v. Saratoga and Wash. R. R. Co., 20 Barb. 449; Farwell v. Boston and Worcester R. R. Co., 4 Metcalf, 49–62.

George Shiras, Jr., for defendants in error.

The plaintiff offered to show that he notified both the foreman and the superintendent of the road of the defect in the switch. This was only notice to a fellow-servant, and could not bind the company. An employer is not liable for the negligence of a fellow-servant. Ryan v. The Cumberland Valley R. R. Co., 11 Harris; Frazier v. The Penna. Railroad Company, 2 Wright, 110; Caldwell v. Brown, 3 P. F. Smith, 453; Gilman v. Eastern Railroad Company, 25 N. Y. 565.

The plaintiff was guilty of contributory negligence in using the switch, when he knew the promise to repair had not been complied with. Snow v. Housatonic Railroad Company, 8 Allen, 441.

January 13. GORDON, J., delivered the opinion of the court. The plaintiff made the following offer of evidence, to-wit: That he was employed in June or July, 1869, as a conductor of freight trains on the Pittsburgh and Connellsville Railroad; "that he brought coal trains down the road with other freight. That the defendants had in their use and occupation a switch, siding, or branch road, near the Pittsburg depot of said road, on which coal cars were to be run out, in order that the coal might be emptied on a platform, and that it was the duty of the conductor to run out coal cars, which he had brought down with his train, on said switch, siding, or branch, that the same might be emptied on said platform. That by reason of the shortness of the curve on said road or branch, and the improper construction of the frog, or connection with the main track, it was hazardous and dangerous to run said coal cars out on said switch or siding, and that the plaintiff had notified the superintendent of the railroad, also the foreman of the road, of the said hazard and danger, and the superintendent and foreman promised to repair the same so as to avoid the hazard and danger, requesting the plaintiff to continue his work, observing proper care, until the defects could be remedied. That neither the superintendent, nor any one else, took any steps to repair said defects, and while plaintiff was running part of his coal cars over said switch, with brakemen on the train, in June or July, 1869, using due care, the front car of the train, in consequence of the shortness of the curve, was forced from the track and fell to the ground. That the plaintiff was on the second car from the fore end of the train, which was also forced from the track, and was, in consequence of the shock to the car in which he was, thrown down from the track, a distance of about twenty feet, and very seriously injured."

The defendants' counsel objected to this offer: 1st. "Because the injuries complained of were received by the plaintiff while employed as conductor on defendants' road, and were incident to his employment as such."

2d. "That the plaintiff, being fully aware of the condition of the switch, voluntarily continued to expose himself to the threatened danger, and was thereby guilty of such contributory negligence as will disable him from a recovery." The court sustained the objections and overruled the offer.

We hold this action of the court to be erroneous. It is true, the master is not responsible for accidents occurring to his servants from the ordinary risks and dangers which are incident to the business in which they are engaged; for, in such cases the contract is presumed to be made with reference to such risks. But, on the other hand, where the master voluntarily subjects his servants to dangers, such as in good faith he ought to provide against, he is liable for any accident arising therefrom. In the case of Clarke v. Holmes (7 Hurl. & Nor. Ex. Rep. 937), it was ruled that where one was employed to oil dangerous machinery, the guard or fence around which was broken, and of the dangerous character of which he had complained, the employer was liable for damages to the employee, arising from the defect complained of. In this case, though there was a statute requiring the fencing of hazardous machinery, the ruling was, nevertheless, put upon the general grounds of the master's duty not to subject his servant to extraordinary dangers which he ought to foresee and prevent. We have also a case in point in Snow v. Railroad (8 Allen, 441), where the company was held liable to an employee for an injury caused by the want of proper repairs in its road bed. In both these cases the defects from which the accidents arose were known to the employees; but as they were injured in the discharge of duties imposed upon them by their employers, such knowledge was adjudged not to raise a presumption of concurrent negligence. This doctrine is obviously just and proper. The servant does not stand on the same footing with the master. His primary duty is obedience; and, if when in the discharge of that duty he is damaged through the neglect of the master, it is but meet that he should be recompensed. The general principle, as recognized by our own cases, *inter alia*, Caldwell v. Brown (3 P. F. Smith, 463), and Frazier v. The Railroad (2 Wright, 104), is that the employer is bound to furnish and maintain suitable instrumentalities for the work or duty which he requires of his employees, and, failing in this, he is liable for any damages flowing from such neglect of duty.

In this discussion, however, we are not to forget that the servant is required to exercise ordinary prudence. If the instrumentality by which he is required to perform his service, is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master can not be held liable for resulting damage. In such case the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he would otherwise be entitled. But where the servant, in obedience to the requirements of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury; or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such a case the master is liable for a resulting accident. The present case may be used as an example to illustrate what we mean. Let it be considered that the switch in question was dangerous, yet doubtless many trains had passed over it safely, and hence a man of common prudence might well conclude that, though it was more than ordinarily dangerous, yet many more trains might in like manner be passed over. Under such a state of facts the conductor might properly rest upon the judgment of his superiors, who requested him to continue its use, hoping that by extra care and skill he might avert accidents, until the switch was reconstructed or properly repaired. On the other hand, if the defect was so great that obviously with the use of the utmost skill and care the danger was imminent, so much so that none but a reckless man would incur it, the employer would not be liable.

These, however, are questions which necessarily grow out of the facts of the particular case under consideration, and must therefore be referred to the jury.

Again, where the defect in the machine, or other appliance from which the danger arises, is of such a character, or occurred at such a time, that the employer can not reasonably be expected to have knowledge thereof, it is the duty of the employee to give him notice, and the neglect of such duty exempts the employer from responsibility.

The plaintiff's offer met this requirement. He proposed to prove that he notified the superintendent and foreman of the dangerous character of the switch in question. It is objected, however, that this would not be sufficient, because notice to a subordinate, however extensive his authority, is, after all, but notice to a fellow-servant, and therefore not binding upon the master. In ordinary cases such is undoubtedly the rule, but its strict applica-

tion in the case of corporations, such as the defendants, representing a multitude of shareholders, is impracticable. Hence we approve of the doctrine announced in the case of Frazier v. The Railroad Co., already referred to, that it is not the company, but the officer to whose care is committed this particular department of its business, who is expected to use ordinary care in the conduct thereof, and whose negligence therein is the negligence of the company. It is apparent, from this authority, that the proper person to notify of the defect complained of, in the case in hand, was the superintendent of the defendant's works.

As his powers were plenary, he could readily have applied the necessary remedy, and if he neglected so to do, his default was the default of the company.

As the plaintiff's offer embraces the proposition of notice to the defendant's superintendent, it should have been admitted.

The judgment is reversed, and a new *venire* ordered.

JUDGMENT REVERSED.

[See Devitt v. Pacific Railroad Company, 12 Amer. Law Reg. (N. S.) 104! Ed. Weekly Notes.]

Liability of a Railroad Company for the Escape of Fire from its Engine—Proof of other Fires.

FRANKLIN LESTER v. THE KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS RAILROAD COMPANY.

Supreme Court of Missouri, May Term, 1875.

Hon. DAVID WAGNER,
" WM. B. NAPTON,
" H. M. VORIES,
" T. A. SHERWOOD,
" WARWICK HOUGH,
} Judges.

1. **Railroads—Fires Communicated from Engine—Evidence—Other Fires.**—When the plaintiff's evidence tends to show that fire escaped from one of defendant's engines, and was communicated to plaintiff's premises, and the defendant offers evidence tending to prove that such engine was provided with the best-known appliances for preventing the escape of fire; that the fire in question could not have escaped therefrom, and that its employees were, at the time, in the exercise of due care, it is error to permit the plaintiff in rebuttal to show that other fires had been occasioned in that neighborhood about that time, by sparks, emitted from passing engines belonging to the defendant.

2. **Pleading—Practice—Evidence—Variance.**—Where the petition charges that the act complained of was negligently and carelessly done, it is not error to permit the plaintiff to prove that it was wilfully done; if the variance is deemed material by the defendant, the court would, on a proper showing, require the plaintiff to amend his petition to conform to the facts, and the defendant would be given an oportunity to make his defence. 2 Wag. Stat. 1033, § 1.

3. **Practice—Instructions.**—It is error for the court, in instructing the jury, to submit an issue of fact unsupported by the testimony. To do so might mislead them into the belief that there was evidence on which they might find that fact, and base their verdict upon it.

Appeal from the Holt Circuit Court.

HOUGH, J., delivered the opinion of the court.

This was an action for damages, occasioned by the destruction of certain personal property of the plaintiff, by fire, which it was alleged the defendant negligently and carelessly permitted to escape from its engines, whilst engaged in running and operating its railroad in Holt county. It appears from the testimony, that about the 9th day of October, 1873, soon after a freight train of the defendant passed the premises of the plaintiff, a fire broke out in the dry grass on open and uncultivated prairie lands, adjacent to defendant's track, which fire was communicated by high winds to the premises of the plaintiff, and destroyed a considerable quantity of hay and oats, and other articles of a different character. The plaintiff traced the fire to the place where it began, about an hour and twenty minutes after its occurrence, and there found as he testifies, a partly consumed lump of coal, about the size of his fist, which "had melted and run together in a mass" and which he picked up and found to be still so hot, that he could not hold it. No witness testifies positively as to the origin of the fire, or as to where the burning coal came from. The testimony of the defendant tended to show that it had on the engine drawing the train which passed immediately before the fire, and was supposed to have occasioned the burning, the best smoke stack in use, which was furnished with the most approved spark arresters; that the flues in the smoke stack were not more than two inches in diameter; that the spark arrester was in good condition, and its interstices were not of greater diameter than from three sixteenths to one-quarter of an inch; that the fire box had a grate beneath it, with openings one-quarter of an inch only in diameter, and was so constructed that no cinders could escape from it to the track; that no burning coal or cinder was taken by any one from the fire box of said engine, while passing the place where the fire originated; and that the engineer in charge of the engine was a competent and careful man.

The court permitted the plaintiff to prove in rebuttal, that other fires had been occasioned in that neighborhood, about that time, by sparks emitted from passing engines belonging to the defendant; to the admission of which evidence, the defendant objected and excepted, on the ground that it was incompetent, irrelevant, inapplicable to the issues made by the pleadings, and calculated to prejudice the jury against the defendant, and for the further reason that it put in issue the equipment and management of all of defendant's engines in the month of October, 1873.

The court of its own motion gave three instructions, the first of which in substance, directed the jury that if they believed from the evidence, that the fire which caused the damage, escaped *or was thrown* from defendant's engine, through the carlessness and negligence of defendant's servants, or the insufficient or defective character of the machinery used, and occasioned the injury complained of, they should find for the plaintiff.

The second instruction was to the effect that it devolved upon the plaintiff to show by a preponderance of testimony, that the fire which burned the plaintiff's property, escaped *or was thrown* from defendant's engine, through the negligence of defendant's servants, or by reason of the inadequacy of the apparatus employed to prevent the escape of fire, when controlled by careful and competent servants.

The third told the jury, that if they found that plaintiff's property was burned by fire, which escaped, *or was thrown* from defendant's engine, they were at liberty, if in their opinion the facts warranted such inference, to infer that the fire resulted from the negligence or carelessness of the defendant, or its servants.

The defendant asked eight instructions, three of which were given, the fourth and fifth were modified by the court, and the sixth, seventh and eighth were refused. There was a verdict and judgment for the plaintiff, and defendant has appealed to this court. The court erred in permitting the plaintiff to introduce testimony as to the occurrence of other fires, occasioned by sparks escaping from defendant's engines. This very point was passed upon in the case of Coale *et al.* v. The Hannibal and St. Joseph R. R., decided at the present term.

It appeared in that case, that the fire occurred on October 20, 1872, and was supposed to have been occasioned by sparks which escaped from engine No. 6. A witness for the defendant had testified, that the engine from which the fire had escaped, was supplied with the most approved spark-arrester, and manned by competent and careful servants. On cross-examination the plaintiffs elicited the fact, that all other engines of the defendant were provided with similar contrivances to prevent the escape of fire, and then introduced evidence of other fires which occurred along the line of defendant's road about the same time, and which were caused by the escape of fire from the defendant's engines. On this point Judge Vories, who delivered the opinion of the court, says: "This evidence it seems to me was collateral to the issues in the case. To prove that some one of defendant's engines was insufficient, or that the hands on some of said engines had so

carelessly conducted the same, as to permit the escape of fire, is not competent evidence to prove that the persons conducting engine No. 6, on the 20th of October, 1872, were negligent, or that said engine was insufficient, and said evidence could not be made competent by the attempt thereby to rebut evidence which was wholly immaterial, and which had been elicited by the plaintiffs. The evidence was collateral and ought to have been excluded by the court."

It is objected to the first and second instructions given by the court, that they were not warranted by the pleadings; that the issue raised by the pleadings, was whether the defendant had carelessly and negligently permitted fire to escape from its engines, and not whether fire had been thrown from its engines, by its servants. There was really no testimony that the burning cinder, which caused the fire, was thrown by defendant's servants, from the passing engine. The testimony of the defendant's witnesses tends to show that it was impossible for the cinder, on account of its size, to have escaped through the grating under the fire-box, or through the flues or netting in the smoke stack, and the testimony that it was *not* taken from the fire-box by the defendant's servants, was the only testimony on this subject, and this, as appears from the record, was brought out by the defendant itself. If testimony had been offered on that point, by the plaintiff, tending to show that it was thrown out by the defendant's servants, it would only have amounted to a variance, which, if deemed material by the defendant, would upon a proper showing, have authorized the court to require the plaintiff to amend his petition, and the defendant would then have been permitted to make its defence thereto. 2 Wag. Stat. 1033, § 1. But as there was no evidence tending to show that the servants of defendant threw from the engine the burning cinder, which caused the fire, the instructions given by the court, should not have submitted that question to the jury. To do so was to mislead the jury into the belief that there was evidence on which they might find that fact and base their verdict upon it.

The third instruction given by the court, was further objectionable, in that it excluded from the consideration of the jury, the testimony introduced by the defendant to rebut the inference of negligence, arising from the escape of the fire.

It is unnecessary to comment on defendant's fourth and fifth instructions. They were properly refused as asked, and were correctly qualified by the court.

The sixth, seventh and eighth instructions asked by defendant related to alleged negligence on the part of the plaintiff in failing to remove the dry grass between his premises and the defendant's track, but as they did not conform to the rule on that subject laid down in Fitch v. The Pacific Railroad, 45 Mo. 322, they were properly refused. The judgment will be reversed, and the cause remanded.

All the judges concur. JUDGMENT REVERSED.

NOTE.—There are, perhaps, authorities that support the rule stated in the foregoing case, as to the admissibility of evidence of other fires. See B. & S. R. R. Co. v. Woodruff, 4 Md. 254; Boyce v. Cheshire, 42 N. H. 97; but these cases have been practically overruled. Such evidence was held inadmissible in B. & S. R. R. Co., Woodruff 4 Md., for reasons similar to those urged in Coale v. Han. & St. Joe R. R. Co., cited in the principal case; but the question was again before the Supreme Court of Maryland in Annapolis, etc., R. R. Co. v. Gantt, 39 Md. 115, and the former decision very much qualified. The plaintiff, who was sworn as a witness, testified that he had observed the engines of the defendant about the time of the fire complained of, and within a week before, scatter sparks capable of setting fire to combustible articles along the road, but could not state that he had ever seen the engine drawing the train on the morning of the fire, scatter such sparks. The court said: "We entertain no doubt that this was competent and admissible evidence, both for the purpose of proving that the fire in question was occasioned by the locomotives, and as tending to prove negligence on the part of the defendant, in the construction and management of its engines." And referring to B. & S. R. R. Co. v. Woodruff, *supra*, the court said: "There the evidence offered was that before the occurrence of the fire in question, other property had been set on fire by locomotives of the defendant; no time was specified, it might have been, as the court said, 'six months before, or five years.' Besides, such testimony would simply tend to prove that a passing locomotive is capable of setting fire to property near the railway, but could throw no light upon the question, whether the fire complained of was in fact caused by the locomotives, or tended to show the existence of negligence in the particular case under consideration. Here the evidence was confined to the time of the occurrence, within a week of the happening of the fire on the plaintiff's property; and pointed directly to the condition of the defendant's engines, tending to prove that they were not in suitable repair at the time of the jury, and we think, both upon reason and authority, it was admissible for the purpose mentioned."

In Longabaugh v. The Virginia, etc., R. R. Co. 9 Nevada, 271, it was said: "What are the facts of this case? Plaintiff's wood caught fire in some manner, to him, at the time, unknown. How did the fire originate? This was the first question to be established in the line of proof. Positive testimony could not be found. The plaintiff was compelled, from the necessities of the case, to rely upon circumstantial evidence. What does he do? He first shows, as in the New York case, the improbabilities of the fire having originated in any other way except from coals dropping from the defendant's engines. He then shows the presence, in the wood-yard, of one of the engines of the defendant, within half an hour prior to the breaking out of the fire. Then proves that fires have been set in the same wood-yard within a few weeks prior to this time, from sparks emitted from defendant's locomotives. I think such testimony was clearly admissible, under the particular facts of this case, upon the weight of reason as well as of authorities. * * * The evidence was admissible, as tending to show a probable cause of fire, and to prevent vague and unsatisfactory surmises on the part of the jury. Upon the question of negligence, it was admissible as tending to prove that if the engines were, as claimed by defendants, properly constructed and supplied with the best appliances in general use, they could not have been properly managed, else the fires would not have occurred. There is not, in my judgment, any substantial reason for the objection urged to this testimony, on the ground that it referred to other engines than the one shown to be present on the day of the fire. The business of running the trains on a railroad, supposes a unity of management and general similarity in the fashion of the engines and character of their operation." And in the same case it was held proper to follow up the evidence of fires about the time of that complained of with evidence of fires extending back over a period of four years. The court citing, with approbation, the language of Davis, J., in Field v. N. Y. Cent. R. R. Co., 32 N. Y. 339: "The more frequent these occurrences, and the longer time they had been apparent, the greater the negligence of the defendant, and such proof would disarm the defendant of the excuse that on that particular occasion the dropping of fire was an unavoidable accident." A witness was permitted to testify that she had seen fire on the defendant's track four weeks after the fire complained of. This fire was caused by coals dropped from another engine. It was held that this evidence was properly admitted. The court said: "Certainly such testimony would have been admissible if directed against the 'I. E. James,' the offending engine. But there is no pretense that the 'I. E. James' is differently constructed from the 'Reno,' or any other locomotive on defendant's road; or that any different appliances are used to prevent the emission of sparks from the smoke-stack, or the dropping of coals from the ash-pan. It was within the power of defendant, which must necessarily have intimate relations with all its engineers, conductors and employees, to prove these facts, if they existed. The *onus probandi* is upon the defendant. If one or more of its engines drops coals from its ash-pan, or emits sparks and cinders from its smoke stack just prior to or soon after property on the line of its track has been destroyed by fire without any known cause or circumstance of suspicion besides the engines, it becomes incumbent upon the railroad company to show that their engines were not the cause."

The leading case on this subject in this country is Sheldon v. Hudson R. R. Co., 14 N. Y. 221, where Denio, J., delivering the opinion of the court, said: "I think, therefore, it is competent *prima facie* evidence, for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that, about the time when it happened, the trains which the company were running past the location of the fire, were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned. * * * * The evidence * * * not only rendered it probable that the fire was communicated from the furnace of one of the defendant's engines, but it raises an inference of some weight, that there was something unsuitable and improper in the construction or management of the engine which caused the fire." And see Hinds v. Barton' 29 N. Y. 544; Field v. N. Y. Cent. R. R Co., 32 N. Y. 339; Webb v. R. W. and O. R. R. Co., 49 N. Y. 424.

The same rule obtains in Pennsylvania. In Huyett v. Phil., etc., R. R. Co., 23 Penn. St. 373, evidence of other fires about the same time had been admitted, and properly, it was held. The court said: "How is it possible for the court to say as a matter of law, how many sparks, or how many fires caused by them it takes to prove carelessness? How can the law declare, except as a deduction from facts found, what are sufficient spark-catchers? When we find fires started by a locomotive at a distance of 80 to 100 feet from the road, how can we say that that is no evidence of carelessness? It is a question of fact, whether the small sparks that escape through a good spark-catcher will ignite wood at such a distance. We see wooden houses, and lumber, and firewood and shingles standing all along the very edge of railroads without being burnt; how can we say that the happening of several fires, all about the same time, along the line of the road, is no evidence of carelessness?" But see Railroad Co. v. Yeiser, 8 Penn. St. 366.

In St. Joe & D. C. R. R. Co. v. Chase, 11 Kans. 47, it was held that evidence tending to show that other fires were caused by sparks escaping from defendant's engines immediately before or immediately after the time that the fire complained of occurred, was competent. "Such evidence," it was said, "would clearly tend to show that defendant's engines were not in proper condition for arresting sparks—either that they were not properly constructed, or that they were out of repair." And in A. T. & S. F, R. R. Co. v. Stanford, 12 Kans. 354, it was held that evidence that other engines under like circumstances did not communicate fire at the place where the fire in question occurred, was competent, as tending to prove negligence on the part of the defendant with regard to the engine which caused the fire—either that it was not in good condition, or that it was not properly managed.

And on the same principle, it was held in Cleavelands v. Grand Trunk R. R. Co., 42 Vt. 449, that where the evidence tends to show that engines of proper construction and suitable repair would not scatter fire so as to endanger property, the logical conclusion is that the engine which caused the fire was not properly constructed or was not in suitable repair. And it was further held, that in connection with such testimony, the plaintiff might show "that on or about the time of the fire, the engines used by defendants, running past plaintiff's mills, generally and habitually scattered fire from the ash-pans and smoke-stacks. * * * * For the inference would be from this evidence, in connection with that tending to show that engines which so scatter fire as that it kindles along the roadside, are not of proper construction and suitable repair, that the fire in question was caused by one of those defective engines." The New York and Pennsylvania cases, *supra*, were cited with approval.

And to the same effect, see Ross v. Boston, etc., R. R. Co., 6 Allen, 87. Here the plaintiff introduced evidence showing that within a fortnight previous to the fire in question, the engine complained of had emitted burning sparks that fell upon the building. The defendant's evidence tended to prove that engines similarly constructed have been in use on its own and certain other roads for fifteen years, and that they did not emit sparks that would set fire to buildings. In reply to this evidence, plaintiff was allowed to prove that similar engines on one of such other roads had emitted sparks which had communicated fire to objects along the track. The court said: "The evidence to which the defendants objected was clearly competent. One of the grounds of defence was, that no sparks of coal from the engine of the defendant could reach the premises of the plaintiff, so as to communicate fire. To meet this position, it was certainly fit and apposite for the plaintiff to prove the physical possibility that fire could be so communicated, by showing that on a previous occasion, the same engine, using the same species of fuel had emitted burning sparks which fell within the enclosure of plaintiff. Such evidence would have been open to question, if offered solely to support the plaintiff's case; but it was rendered relevant and material by the ground taken in defence. On the same ground evidence concerning the emission of sparks from similar engines used on other roads was admissible."

It certainly was a part of plaintiff's case to prove that sparks could escape from the engine in question, so as to communicate fire. The burden was on him to prove that, owing to its improper construction or management, the engine could and did communicate the fire. While the evidence would not, perhaps, of itself, be sufficient to fix the defendant's liability, it tended to established one step, at least, in the plaintiff's case. The law presumes that an engine properly constructed will not emit sparks so as to endanger property along the track. Clemens v. Han. & St. Joe R. R. Co., 53 Mo. 366; Spaulding v. C. & N. W. R. R. Co., 30 Wis. 110; Ill. Cent. R. R. Co. v. McClelland, 42 Ill. 355; Longabaugh v. Virginia City, etc., R. R. Co., 9 Nevada, 271; Ellis v. Portsmouth R. R. Co., 2 Ired. L. 138; St. Joe & D. C. R. R. Co. v. Chase, 11 Kans. 47; Cleavelands v. Grand Trunk R. R. Co., 42 Vt. 449; Piggott v. Eastern, etc., R. R. Co., 3 C. B. (54 Eng. C. L.) 229; or the jury may infer negligence from such fact, and that amounts practically to the same thing as far as this question is concerned. Hull v. Sacramento, etc., R. R. Co., 14 Cal. 97; Aldridge v. Great Western Railw. Co., 3 Man. & Gr. (42 Eng. C. L. 272) 515; Huyett v. Phila., etc., R. R. Co., 23 Penn. St, 373 4 Western Jur. 445. The jury would invariably infer negligence as against a corporation. Hence, proof that a given engine did communicate fire would tend to prove that such engine was out of repair at that time. And evidence that a short time before or after it is alleged to have communicated fire to the plaintiff's premises, the engine was out of repair, would cast on the defend ant the burden of showing that at the time of the fire the engine was in proper order.

In Iowa where proof that the fire was communicated by defendant's engine is not *prima facie* evidence of negligence, it is held that, "as in the nature of of the case, the plaintiff must labor under difficulties in making proof of the fact negligence, and as that fact is itself a relative one, it may be satisfactorily shown by evidence of circumstances bearing more or less directly upon the fact o negligence, which might not be satisfactory in other cases free from difficulties and open to clean proofs." Gantly v. C. & N. W. R. R. Co., 30 Iowa, 420; Garrett v. C. & N. W. R. R. Co., 36 Iowa, 121. And see Hull v. Sacramento Valley R. R. Co., 14 Cal. 387.

Boyce v. Cheshire R. R. Co., 42 N. H. 97, is on all fours with the principal case; but the case was again before the supreme court, and is reported in 43 N. H. 627. On the second trial the evidence tended to show that a freight train drawn by one engine assisted by another up an ascending grade, passed along the road a short time before the fire was discovered on plaintiff's premises; that these engines were examined on the day after the fire and found in good repair; that all the engines used on the road were substantially alike in construction, so far as risk from fire were concerned; that they were used in the same way and kept in same repair; that they were frequently examined and defects sometimes found, caused by wear or accident. The plaintiff offered evidence to show that engines used on the road scattered fire; but no evidence as to the condition of those engines other than that above stated was offered. The defendant objected "that no evidence was admissible, as to the effect of any other engine, except those in question here, unless it is shown to be in the same condition; and that no evidence is admissible in relation to any other engine than those here in question." But the court admitted the evidence. And the supreme court affirmed the judgment in favor of plaintiff, holding that neither ground of objection to the evidence was well taken. It was further said, that the remarks of the court in the case as reported in 42 N. H. 97, to the effect that evidence of other fires from other engines would only be competent when the engines were conceded to be similar in construction; used in the same manner, and in the same state of repair, were mere dicta, and not conclusive on the court should the question ever directly arise. On the first trial the evidence wholly failed to show any similarity in the engines. And it was further held, that the evidence then before the court did tend to show that the engines were in the same condition.

In England evidence of other fires at the same place and about the same time is admissible. Piggott v. The Eastern Counties Railw. Co., 54 Eng. C. L. 228; Aldridge v. Great Western Railw. Co., 3 Man. & Gr. 515.

The question of the burden of proof in this class of cases, and the effect of evidence that the fire was communicated to plaintiff's property from defendant's locomotives is elaborately examined in two editorial articles in The Western Jurist for October and December, 1870. (4 Western Jur. 333 and 429.) In summing up, the writer says: "The number and weight of authorities are very manifestly in favor of the rule that the plaintiff in an action for setting fire has the burden of proof; and the fact of fire from an engine is not, of itself, and alone, evidence of negligence; but the plaintiff must prove, in addition thereto, some fact or circumstance tending to show negligence on the part of the company or its employees. The practical difficulties on the part of the plaintiff in making such proof, relieve him, to a greater or less extent, of the necessity of making that clear and preponderating proof required in other classes of cases. Negligence may be shown by proof of repeated and unusual emissions of sparks or dropping of coals by the engines; the extraordinary length and weight of the train; the excessive amount of steam; the stopping in a place of special peril or exposure; the stirring of the fire in such place; the absence of any spark-arrester; the absence of the best known appliances for preventing the escape of sparks or dropping of coals; the defect or want of repair of such appliances; the employment at the time and on the engine of a drunken engineer. These, and perhaps others, have been adjudicated as affording sufficient bases to sustain verdicts."

The necessary limit of this note will not admit of an examination of the authorities bearing upon the question discussed in the foregoing extract, but it is undoubtedly true that the tendency of the decisions is to hold that evidence that the fire escaped from defendant's engines, is sufficient to put the defendant to the proof of due care in the management and construction of its engines It matters very little whether such fact is full *prima facie* evidence of negligence as against the defendant, or whether it is a fact from which the jury may properly infer negligence; for in either case the defendant is put to

its defence. The question whether negligence is to be *presumed*, or *inferred* from the escape of fire from its engines is of very little moment to a railroad company, whose stockholders are not supposed to take a very lively interest in the refined technicalities of the law. And if it is difficult for a plaintiff to show actual negligence in such cases, it is still more difficult for the defendant to disprove the shadowy constructive negligence imputed to it in many instances. It is a necessity of railway management that trains be run on a regular schedule of time; and that all freight and passengers offered be carried without unnecessary delay. The movements of trains cannot be made to conform to the fluctuations of wind or weather; nor can they be regulated so as to obviate greater danger in time of extreme drouth than would exist in the time of a flood. The maxim *sic utere tuo ut alienum non lædas*, requires a person to so use his own property that no injury shall be occasioned to others by such use. All that the law enjoins is, that in the use of his own property, or in the exercise of his own rights, one shall not unreasonably infringe upon the rights of others. Trains must be run in all kinds of weather, and at all seasons; the track cannot be removed from one locality to another to avoid endangering combustible matter that may be placed or accumulated near it; the best of machinery is subject to accident, and will wear out; the most careful man is sometimes guilty of slight negligence; the business of the country is done by men, not the most careful, and with machinery something less than perfect; hence, it seems to me, that the burden ought to be on the plaintiff in such cases to show substantially a want of such care as an ordinarily prudent man would exercise in an undertaking of equal hazard; but the decisions seem to declare a more stringent rule. It is true that from the very nature of things, the plaintiff's evidence in such cases must often be wholly circumstantial; and where all the surrounding circumstances are most reasonably explained on the hypothesis of the defendant's negligence, the burden ought to be on it to show the exercise of due care. M. A. L.

Foreign Selections.

FELONY BY CARRIERS' SERVANTS.—We propose to call the attention of our readers to some very recent cases on the liability o carriers for loss caused by their servants' felony. One of these—Gogarty v. G. S. and W. Ry. Co., 9 Ir. L. T. R. 99—was decided in this country in the Court of Exchequer Chamber, while the others—M'Queen v. Great Western Railway Co., 44 L. J. Q. B. 130, and Drayson v. Horne, 32 L. T. (N. S.) 691—were decided by the English Court of Queen's Bench. The authority of the two cases firstly mentioned may, we presume, be taken as decisive on a point of considerable interest, both to railway companies and to the general public; but we think we are justified, when we see how much the highest legal authorities differed in deciding them, in calling the attention of our readers to the difficulty in which a court finds itself when it interferes with the verdict of a jury on a point of evidence, and attempts to perform the almost impossible task of drawing a hard and fast line as to what evidence should, and what should not be decisive in a question of the description there involved. If refinements of this character are to become part of our system, we shall soon find ourselves struggling vainly with the inextricable meshes in which many continental tribunals find themselves involved, having once laid down hard and fast rules as to the quality of evidence requisite in particular cases; and though we had thought that such doctrines were totally foreign to our system, we believe that, if our readers will follow us in a short *resume* of the facts and judgments in the two cases we have firstly alluded to, they will find that our apprehensions are by no means groundless. The facts in the case of M'Queen v. Great Western Railway Co., were shortly as follows:—A picture dealer delivered certain drawings, valued at £365, at Cardiff, to the servants of the defendants, to be conveyed to London. The packages, labelled "valuable pictures," were placed on a truck of the defendants, which, about 12 o'clock noon, was shunted into an open yard, where it remained till 8:20 p. m. The yard into which the truck was shunted was surrounded by a fence, but the fence was of such a nature that anyone could have got over it; and the public appear to have had access to the fence, and over it into the yard. When the truck arrived in London the drawings were gone. Had the value of the pictures been declared, it would have been requisite for the owner to have paid twelves guineas, but that course had not been adopted by him. It was contended for the plaintiff, that although the value had not been declared, he was entitled to recover, as the drawings had been stolen by the defendants' servantt at Cardiff. No witnesses were called for the defendants. The learned judge left the case to the jury, who returned a verdict for the plaintiff. The defendants then applied to the court for a rule for a non-suit. The plaintiff relied greatly on a dictum of Pigott, B., in Vaughton v. London and N.W. Railway Co., (L. R. 9 Ex. 93), where he observes: "In the present case I think the evidence given was more consistent with the guilt of the defendants' servants, than with that of any person not in their employment, for the defendants' servants had greater opportunities than others. That being so, there was a case for the jury, the *onus* of answering which was on the defendants. They might have answered it by calling the servants towards whom suspicion was directed, but they determined not to call witnesses, they preferred to leave the matter unexplained." This view of Mr. Baron Pigott, which expresses shortly our views in felicitous terms, was not coincided in in M'Queen's case. Chief Justice Cockburn declined to differ positively with the doctrine laid down in Vaughton's case, that it is not necessary to show, in order to make out a replication of a felonious act on the part of the carriers' servants, that the taking was by any particular servant or servants, but that it is enough if there is proof to satisfy the jury, that the taking was by some one who was more or less one of the company's servants, without specifying particularly which of them. The Chief Justice lays down his view of the law as follows:—"The question of probability or improbability can only be considered as an ingredient or element in the consideration of the general case. But it always pre-supposes that a *prima facie* case has been established. I think a verdict for the plaintiff would be unsatisfactory which rested on no better evidence than that produced in this case. It really comes to this, and no more than this, that there is a greater degree of probability that the defendants' servants took the drawings, by reason of their greater facility of access and opportunity of stealing, than that a stranger took them; it is merely a question between the railway company's servants and anyone else, and there is nothing whatever to point to the railway company's servants particularly, except facility of access." The rest of the court concurred in the view taken by Chief Justice Cockburn, and decided in favor of the defendants. The court apparently endeavored to explain away the dictum of Mr. Baron Pigott in Vaughton's case which we have given above, but in our opinion, that dictum is not susceptible of any such refinement, and will only bear one broad interpretation—viz., that if there was more opportunity for the defendants' servants to steal the goods than any other person, the whole question should be left to the jury, and that it is not for the court to lay down general canons as to the necessity for the preliminary establishment of a *prima facie* case, and that they should in no way hamper the action of the jury, where there is a greater probability of the company's servants being guilty than any other person. The Irish case to which we alluded above—Gogarty v. The Great S. and W. Railway Co., 9 Ir. L. T. R 99—must be so fresh in the memory of our readers that it will not be necessary to refer to its facts at any length. The action was brought against the defendants for the loss of a box containing jewelry, the value of which had not been declared, and which was placed in the defendant's train, to be conveyed to Mullingar (a station not on the defendant's line), *via* Tullamore. On the arrival of the train at Portarlington, the box was seen being carried across the line to the Tullamore train by one of the company's servants, and could not be found when the train arrived at Tullamore. At the trial the company produced only two, out of a numerous staff of servants, who denied that they had abstracted the box. The Court of Common Pleas held that there was sufficient evidence to justify the jury in finding that a felony had been committed. But on appeal to the Exchequer Chamber, this de-

cision was reversed by a majority of one. Dowse, B., observed: "If we affirm this judgment of the Court of Common Pleas, we will practically repeal the statute. Every loss unaccounted for will be made a felony, and, by applying Vaughton v. London and North Western Railway Co., a felony by the servants of the company. I can not join in creating an artificial felony—one which would be the creation of the judicial mind as much as John Doe and Richard Roe." The majority of the court coincided in this view, and we refer our readers to the report for a very full and very able defence of this view of the law, which will be found contained in the judgments of the learned judges who formed the majority. The opposite view is stated in a most lucid manner, in the judgment of the Chief Baron. First addressing himself to the evidence as to a felony having been committed, he remarks: "The fact that a label was attached to the box, with the name and address, is evidence from which a jury might infer that its loss, accompanied by the absence of any tidings of it for many months, was not reasonably consistent with accident; and if not thus consistent, I see nothing to prevent the jury from inferring that it had been feloniously dealt with." As to the point of the company's servants being the guilty parties, he says: "In my opinion, it was competent for the jury to draw the inference, that the company's arrangements at Portarlington were such, that a box being carried by a porter charged with that duty, from one train to another, could not have been stolen without the connivance of some servant of the company in the theft." Looking at the whole case, we must, though with the greatest respect for the opinions of the learned judges who formed the majority, express our opinion that the decision of the Court of Exchequer Chamber, differing as it did from the opinion of the majority of the judges on the Irish Bench, went too far in limiting the just province of a jury in drawing inferences from facts, and in attempting to lay down a fixed standard of evidence, up to which every case must come, before a jury may draw an inference of felony by the company's servants. At the same time, of course, no one can deny that in a total absence of evidence on such a point, the court would be justified in forbidding the jury to come to such a verdict. But, where there was evidence on the point, we can not see why the jury should be forbidden to exercise their right of drawing inferences from facts. Dealing with the question merely from a legal point of view, we should of course, not allow ourselves to be affected by the mysterious hints alluded to by Baron Dowse, as to the ultimate fate of the box there in question; but it may be of some interest to mention, as we are enabled to do on reliable authority, that the box was ultimately reecovred, and its contents restored to the owner, and that the case was in consequence settled.

In Drayson v. Horne, the case lastly above referred to, it appeared that the plaintiffs had delivered a small box, containing jewels and gold ornaments, to the defendants for carriage, without any declaration of its contents, or intimation of their value. The articles were stolen by the defendant's servants whilst in their charge. The plaintiffs had been aware of a notice affixed to the defendants' receiving house, and were content to risk the provisions of the Carriers' Act. It appeared that this notice expressly referred to the Carriers' Act, and adopted the words of the 1st section; it contained the usual increased charges for insurance of the articles mentioned, and also a reference to the carriage of horses and cattle under other acts. There was, however, no mention in it of the exception as to loss arising by the felonious acts of servants, provided by the 8th section of the Carriers' Act. It was contended for the defendants, that the contract was declared by the notice, and that as that exemption was not expressed, the defendants were not liable. The court, however, held that the notice merely incorporated the Carriers' Act in the contracts of carriage made by the defendants, and did not create a special immunity from loss arising from their servants' felonious acts; and that while there was nothing to prevent such a special contract being made (it appearing to be assumed that such would be reasonable), yet that even if the notice created such a special contract beyond the scope of the Carriers' Act, it would be necessary to show plaintiffs' express consent to its terms before the claim to recover the value of the articles stolen could be barred.—[*The Irish Law Times.*

Book Notices.

A TREATISE ON THE LAW OF PROMISSORY NOTES AND BILLS OF EXCHANGE. By THEOPHILUS PARSONS, LL. D. *Second edition*, revised and enlarged. Philadelphia: J. B. Lippincott & Co. 1875. 2 volumes, 8vo.

The preface to this edition is dated in February, 1874. This edition has, we understand, been in the hands of the profession about a year, and they are no doubt tolerably well advised by experience as to the additions which have been made in it. By comparing the table of cases in this edition with that in the edition of 1862, we should judge that about two hundred cases have been cited in this which were not cited in that. We observe that the numbers of pages of each volume of the present, is the same as the corresponding page of the former edition. This fact has led us to examine the manner in which the new cases have been added, and we find that this has been done by recasting a page or a part of a page in the stereotype plates, here and there, where it has been necessary to insert the new matter. By doing this, sometimes by lengthening the page slightly, where it could be got in in this way, and sometimes by re-setting the page and "drawing the leads," as printers say, the additional matter has been sandwiched in, without any appreciable change in the appearance of the volumes. This plan is frequently pursued by book-makers, where the scope of the revision embraces only the making of certain additions, without a re-writing of the entire work. The few additions which the lapse of twelve years has been thought to render necessary have been thus scattered through these two volumes in the shape of brief notes, added in the manner indicated. We have not time to examine in detail the character of these additions, nor even to search for omissions; but we may say that we have looked in vain for several very important cases decided prior to the date of this revision, viz: Foster v. McKinnon, L. R. 2 C. P. 704 (1869); Douglass v. Matting, 29 Iowa, 498 (1870); and Taylor v. Atchinson, 54 Ill. 196 (1870); which relate to the rights of *bona fide* holders where the signature of the person sought to be charged has been obtained by deceiving him as to the character of the paper signed. Singularly enough, Whitney v. Snyder, 2 Lansing, 477, decided in the Supreme Court of New York in 1870, is the only case noticed by Prof. Parsons on this important question. It should really seem that "due diligence" would not have overlooked the others.

Next to Prof. Parson's work on contracts, this is probably the most valuable of his works. We understand that it has a larger sale in this country than any other work on commercial paper, and it appears to be much more frequently quoted by American judges than any other. This is the highest praise that can be bestowed upon any law book; for in works designed for the assistance of a busy profession practical usefulness must yield to mere excellence as a work of art. In our judgment the excellence of the present work consists in the fact that while it discusses with adequate fullness the principles of law which relate to commercial paper, it exhibits in a succint form the results of a great number of adjudications, thus furnishing the most complete index which we have to the state of the law on the subject of which it treats.

HISTORY OF THE LAW OF REAL PROPERTY.—An Introduction to the History of the Law of Real Property, with Original Authorities. By KINELM EDWARD DIGBY, M. A., of Lincoln's Inn, Barrister-at-Law, late Vinerian Reader in English Law, and formerly Fellow of Corpus Christi College in the University of Oxford. Oxford: At the Clarenden Press, London and New York; MacMillan & Co. 1875.

The value of a work of this character could best be stated by some one who had used it, or attempted to use it, in the instruction of students. Its object is to afford a manual for the instruction of students at the English Universities. The author wisely concieved that the best way to lead the minds of such persons into an understanding of the elementary principles of the law of real property, would be to sketch its history and to map out, in brief outlines, the long and curious process by which it has grown into its present state. In this we should judge he has succeeded, as far as the difficulties attending the subject would permit.

He divides the subject into ten chapters. The *first* treats of the elements of the law of land before the reign of Henry the Second. It comprises an account of Saxon Customary Law, discussing the effect of the Teutonic settlement in Britain, and giving an account of the village communities of the Germans, and the relation of *lord* and *man*. It also discusses the effects of the

Norman conquest; the relation of the *king* to the *land*; the development of the idea of *tenure*, and the relations of the lords of districts or manors to their tenants.

The *second* chapter gives an account of the state of the law relating to land in the reign of Henry the Second; embracing an account of the supremacy of the Curia Regis in matters relating to the freehold; of the relation of lord and free tenant; of the feudal incidents of reliefs, aids, guardianship, chivalry or knight service, guardianship in socage and marriage of female tenants; of escheat and forfeiture; of the descent of an estate of inheritance; of alienation, of fine lands, of the modes of recovering the seisin of lands; of assizes of mort d'ancester and of novel disseizin.

The *third* chapter gives an account of the state of the law from the end of the reign of Henry the Second to the end of the reign of Henry the Third, embracing the subjects of magna charta, reliefs, guardian and ward, marriage, dower, scutage and aids, forfeiture, alienation, mortmain, rights of the lord of a manor over the waste, and the Statute of Merton; also the subject of tenures; of a common law conveyance of a freehold estate, namely, by charter of feoffment, or by livery seisin; of villenagium and non-free tenure; of the differences of freehold estates in respect of their duration; of estates of freehold and estates less than freehold; of conditional gifts; of tenancy by the curtesy of England; of terms of years: and of servitudes, including rights of common.

The *fourth* chapter introduces us to the legislation of the reign of Edward the First. It presents, with suitable comments, a number of famous statutes embracing the 4 Ed. 1. c. 1 (*Extenta Manerie*) which is said to show the legal conception of a manor during that reign. It comments briefly upon alienation in mortmain, and sets out briefly the Statute *De Viris Religiosis*, 7 Ed. I, Stat. 2, c. 13, and also the statute of Westminster II., 13 Ed. I., c. 32. It introduces us to the subject of estates tail, and gives us the text of the celebrated Statute *De Donis*, 13 Ed. I, c. 1. It gives us the text of the statute of Westminster II. 13 Ed. I., c. 46, which extended the provisions of the statute of Merton to those who enjoyed rights of common *appurtenant*—that is, to those who, without being tenants of the land, were entitled to common of pasture over the lord's wastes. This chapter also touches again upon the subject of alienation, and gives us the text of the Statute *Quia Emptores*.

In his *fifth* chapter the author completes the earlier history of the law of real property. It introduces again, briefly, the subject of leaseholds and also that of estates tail, and gives a brief account of the fiction of "suffering a recovery" by which estates tail were turned into estates in fee simple.

It is interesting, when we hear courts now-a-days accused of "judicial legislation," to turn back to those old times, and see how, after the legislature had, by the statute *De Donis*, enabled the great landed proprietors to tie up their estates in strict entail, the courts set themselves to work diligently to repeal and nullify that statute. In order to accomplish this, they resorted to a *trick*, that is to say, to a *fiction*. In our day a judge who would invent and put in practice a fiction in order to nullify a plain act of the legislature, would undoubtedly be impeached. And it is certain that the old judges would not have dared to resort to so bare-faced a trick as the device of a common recovery, in order to nullify an act of parliament, if they had not been sustained in doing so by public sentiment. The question then naturally arises, why did not this public sentiment repeal this obnoxious statute? The answer must be that the parliament only in part represented public sentiment, and that the great landowners had, through their representation in the House, of Lords, the power to render hopeless any attempt at repeal. How different is it with us! Our legislatures represent public sentiment in the largest sense, that is to say, they represent more largely the *lower* than the *better* sentiment of the people. They represent the rabble more largely than they do the better classes, because the rabble outnumbers and outvotes the better classes. If this were not so, it would be impossible to find on the statute books of any American state such shameless laws as those which various legislatures of California have enacted against the Chinese. Therefore, since our legislatures so fully represent the people, should any law on our statute books become as obnoxious as the statute *De Donis*, the remedy would be quickly found, where in every society it ought to be found, in legislative repeal, and not in judicial nullification. But the fact that the old judges had the courage (although by means of falsehood, the device of slaves), to repudiate these unwholesome statutes, should be forever mentioned to their honor. It affords a strong proof that the legal profession, on those great questions, arrayed itself on the side of popular right.

Mr. Digby's *fifth* chapter takes us through the subject of reversions and remainders; of joint tenants, tenants in common and co-parceners; of creditor's rights, remedies by legal process and mortgages.

The *sixth* chapter introduces us to the modern law of real property, and gives an account of the origin and early history of uses or equitable interest in land.

The *seventh* chapter treats of the statute of uses and its principal effects on modern conveyancing.

The *eighth* chapter gives a history of the law of wills of land.

The *ninth* chapter treats of the abolition of military tenures.

The *tenth* chapter treats of titles or modes of acquisition of rights over things real; including title by alienation, by succession, and by escheat; loss and acquisition by lapse of time; compulsory acquisition for public purposes; acquisition under enclosure acts; compulsory enfranchisement of copy-hold; and bankruptcy.

Perhaps one-third of this work is devoted to what Mr. Digby aptly terms "authorities," which consist of ancient charters and statutes, of copious extracts from Bracton and other authors, and of extracts from the Year Books. Of such of these authorities as were in law French, Mr. Digby has favored the student with translation; but such as were in Latin, he has left the student to translate for himself. Many American law students (and, we doubt not, some English ones, too, outside the Universities), would have been equally obliged to him for a translation of the Latin. We think that it was unnecessary to give the originals in an elementary work of this kind, but that translations should have been given in all cases. The advantage of a translation, even to instructors, is too obvious to dwell upon.

Without being able, from lack of experience, to express a decided opinion as to the value of this work to American students and instructors, our impression is, after perusing a large portion of it, that it will be found an exceedingly useful manual, and we advise an examination of it.

Correspondence.

SOME STATUTORY CURIOSITIES.

TRINIDAD, COLORADO, Sept. 17, 1875.

EDITORS CENTRAL LAW JOURNAL:—The laws of a people may always be taken as a good index to their moral and intellectual advancement. The statutes of New Mexico contain many legal curiosities; some of which I present to the curiously inclined of your readers.

WILLS.

The statute concerning wills (§8) provides that, "All written wills shall be permanent and irrevocable, but should the testator desire to revoke the same, he may do so by making special mention of the first will, and in case this should not be done, or should have escaped his memory, he shall refer to it in the following manner: 'That it is revoked and would have been repeated *verbatim*, could he have remembered it.'"

§ 7. "All wills to be valid shall possess uniformity of context. The witnesses shall understand clearly and distinctly every part of the will."

§ 10. "A person having no direct heirs, but legal heirs, may constitute a stranger his heir on condition that it be not an infamous or stupid person."

§ 11. "Any person capable of making a will may authorize any other intelligent person to do it for him."

§ 19. "If the deceased person makes no will, the estate shall be administered by the surviving partner, *if married*, and in the absence of such person, by the nearest relative or other person having an interest, be it an *executor*, *legatee* or creditor." The italics are mine.

Natural, in the absence of legitimate, children, inherit from the father. '*Spurious* children inherit from the mother."

Ch. V, § 10. "Parents and ascendants have the right to disinherit their decendants for the following causes: 1st. For having lain violent hands on them, or for accusing them. 2. For having contrived their death. 3. For having given great cause for waste of the estate. 4. For having accused them of crimes the penalty of which is death, disgrace or banishment. 5. For having access to the wife or friend of the parent, knowing her to be such. 6. For not furnishing means to free them from prison, being able to do so. 7. For preventing them from making their will. 8. For becoming a prostitute before arriving at 21 years of age, but not after that age. 9. When the descendant will not aid a deranged ancestor, who is roaming over the country, being able to do so. 10. For not redeeming them from captivity, being able to do so. 11. For denying their parents.

"Descendants may disinherit their ancestors for the same reasons."

CONVEYANCING.

Ch. XIX, § 1. "Any person or body politic may convey real estate absolute or limited, by possession, in part payment of transfer in the manner and subject to the restrictions in this act."

§ 2. "The term *real estate*, as used in this act, shall be so construed as to be applicable to lands, tenements and hereditaments, including all real movable property."

§ 3. The words *bargain* and *sell*, or words to the same effect, in all conveyances of hereditary real estate, unless restricted in terms express, on the part of the person conveying the same, himself and his heirs, to the person to

whom the property is conveyed, his heirs and assignees, shall be limited to the following cases:

"1. If the conveyor is in possession of an unreclaimed title in fee simple to the property so conveyed. 2. If the real estate is free from all encumbrance suffered to be made by the conveyor, or by any person claiming it under him. 3. For the greater security of the purchaser, his heirs and assigns, suits may be instituted the same as if the conditions were stipulated in said conveyance."

No preceding or subsequent section throws any light on these provisions or this "confusion worse confounded."

§ 17. "All interest in any real estate, either granted or bequeathed, to two or more persons other than the executors or trustees, shall be held in common, unless it be clearly expressed in said grant, that it shall be held by both parties."

§ 24 is apparently designed to test the wisdom of a Philadelphia lawyer, to whom it is here referred for interpretation. It is as follows: "That from and after the passage of this act, whenever a conveyance or bequest is made wherein the conveyor or testator shall hold possession of property, be it lands or tenements, in law or equity, as under the English Statute of Edward the First, styled the 'entail statute,' and said property is to be perpetuated in the family, each one of said conveyances or bequests shall only invest the conveyors or testators with possession during their lifetime, who shall possess, and hold the right and title to said premises and no others, the same as a tenant for life is recognized by law, and at the death of said conveyor or testator, said lands and tenements shall descend to the children of said conveyor or testator, to be equally divided among them as absolute tenants in common; and if there should be but one child, it shall descend absolutely to it; and if any child should die, the part which he or she should have received, shall be given to his or her successor, and if there should be no such successor, then it shall descend to his or her legal heirs."

Perhaps the next section will fully enable your learned readers to interpret this one. It is as follows:

§ 25. "When a balance or residue, in lands or tenements, goods or property, are limited by writing or otherwise, to take effect after the decease of any person without heirs or bodily heirs, or succession, the words 'heirs' and 'successors' shall be construed to mean heirs or successors living when the ancestor died."

Section 26 throws additional light on the subject:

"When the remainder of a possession is limited to the heirs or body heirs of a person who holds said property as a 'life estate,' in these premises the persons to whom at the termination of said life estate are to be heirs or body heirs of said life estate, shall be authorized to purchase the same by virtue of the remainder of the possession so limited in them."

Many other statutes of the territory are equally felicitously worded.

MORALITY.

Those who live in concubinage may be reprimanded by a justice or probate judge, and, if there is no legal impediment, required to marry or dissolve the connection. They are then to be dismissed. Then if they persist in the unlawful connection they may be fined not less than $25 nor more than $80.

If a father, mother or guardain deliver up or sell the person or virtue of any female under their charge, they may be fined not less than $25, nor more than $80.

Any person who entices, seduces or abducts any female may be fined not less than $80, nor more than $100.

If male or female discover the faults of married persons, from which disagreement and evil may result, they shall on conviction be fined not less than $25, nor more than $80.

Another statute provides that abusive and insulting words shall be construed and punished as an assault, *provided*, the defendant may justify by showing that the abuse was given for the benefit of the territory or prosecutor, in which case he shall be discharged.

Singularly, in a Catholic country, we find a statute denounced against the priesthood, the preamble to which recites that "Whereas, various ministers of the gospel are frequently committing grave slanders against particular persons, in temples and chapels, losing sight of charity and evangelical meekness, and profaning those sacred places which are dedicated exclusively to the worship of the Supreme Being; therefore, if, in the future, any minister of the gospel of any denomination whatever, or any other person, by word or any other manner, slander any person or persons within any temple, they shall on conviction before a justice of the peace or probate judge, be fined not exceeding fifty, nor more than twenty-five dollars."

Nine-tenths of the legislators in New Mexico are Mexicans, a few of whom are lawyers, one of whom drafted the statutes on conveyancing and wills and testaments quoted, from crude ideas of law gathered from reading the American or Common Law system. The territory is under the baneful influence of a ring of government officials who deserve the attention of the department of justice at Washington.

OBSERVER.

NOTE.—I once asked the Hon. Wm. Gardner Blackwood, who was one of the judges of New Mexico under President Buchanan's administration, how he construed these and many other statutes of the territory; to which he replied, "If Lord Eldon or Lord Mansfield had lived and applied themselves a thousand years in the effort to place a rational construction on these statutes, they would have ignominously failed. My oath of office did not require me to attempt impossibilities. I had but one course left me, Sir. I disregarded that which it was impossible for me to understand, and followed the common law, and my successors have followed the precedent." O.

SUNDAY CONTRACTS.

ANDOVER, N. H., Sept. 21, 1875.

EDITORS CENTRAL LAW JOURNAL:—The opinion of C. J. English on "Sunday Contracts," may be "exhaustive" in some respects, but it certainly is not in others. Not only decisions on minor points, but many modern ones, and some at least of the leading cases, are entirely ignored. Of the latter class are Bennett v. Brooks (9, Allen, 118), and George v. George (49 N. H. 27, 46).

The former was decided in 1864, and the latter in 1866.

Neither of these cases raise, *in form*, the validity of Sunday contracts, but they contain thorough discussions of the principle upon which such contracts must stand or fall, and the latter case contains a very thorough review of the principal authorities.

George v. George was an important case and received careful consideration, on account of the parties to it, the amount involved, and the great ability of the counsel employed. The written arguments of counsel, which cost immense labor, were not published, 1st, because they would have taken nearly half the volume, and 2d, because no mere abstract could do them justice.

The other counsel were strong men, and eminent in the profession, but the burden of the argument devolved upon Caleb Cushing in support of the will, and the present Chief Justice of the Circuit Court, Foster, in opposition to its probate.

Cushing put the whole weight of his immense learning upon the subject, into his written and oral argument in the cause; and it is but justice to Judge Foster to say that in his reply to Cushing's argument, he showed himself a master of the subject, although he lost the cause.

I have made this historical allusion to the course of argument in George v. George because it occurred to me that it might add to your interest in it should you ever see fit to examine that case.

Very respectfully yours, JOHN M. SHIRLEY.

Notes and Queries.

JURISDICTION OF UNITED STATES COURTS.

ST. LOUIS, Sept. 29, 1875.

EDITORS CENTRAL LAW JOURNAL:—In reply to the enquiry of "C." in your last number, whether a citizen of a *territory* can sue a citizen of this state in the United States Circuit Court, I would refer him to the following cases, in which the Supreme Court of the United States has decided a similar question negatively. In Hepburn v. Ellzey, 2 Cranch, 445, it was held by Chief Justice Marshall, that a citizen of the District of Columbia, is not a citizen of a state within the meaning of the judiciary act, and could not sue in a Federal Court. In New Orleans v. Winter, 1 Wheaton, 91, the same principle was asserted in reference to a citizen of a territory. See also, Barney v. Baltimore City, 6 Wallace, page 287—to same effect—and possibly there may be a still later case, but I presume the above will be considered sufficient.

Respectfully, FRANCIS MINOR.

[Several other letters of a similar import have been received, for which we thank the writers.—Ed. C. L. J.]

STATUTE OF LIMITATIONS—PART PAYMENT—SURETY.

VANDALIA, ILL., Aug. 23, 1875.

EDITORS CENTRAL LAW JOURNAL:—In 1856 A. gave his note to B. for $1,000, with C. as surety. A. has made several small payments upon the note amounting to about $200, one payment in 1859, one in 1862, one in 1869, and one in 1872. In 1874 A. and C. were sued upon the note. C. pleads statute of limitations. The question is, does a payment by the principal made before the note is barred, extend the time when the note would be barred as to the surety. I am inclined to the opinion that the defence is good; but I am interested the other way. I find an Alabama case in American Reports vol. 6, page 693; but it was rendered upon a statute differing from ours. See our Statute of 1869, Gross, page 430.

[See Winchell v. Hicks, 18 N. Y. 558; Caldwell v. Sigourney, 19 Conn. 37; and also the cases cited in 2 Parsons on Notes and Bills, 657, 658.—Ed.]

POWER OF NATIONAL BANKS TO TAKE MORTGAGES OF LAND.

TOPEKA, KAN., Sept. 27, 1875.

EDITORS CENTRAL LAW JOURNAL:—The power of national banks to hold mortgages except to secure debts previously contracted is denied in Fowler v. Scully, 72 Penn. St. 456, and in 2 Dillon, C. C. 371. F.

ANOTHER ANSWER.

EMPORIA, KAN., Sept. 28, 1875.

EDITORS CENTRAL LAW JOURNAL:—In your issue of Sept. 24th, 1875, "H." of Osage Mission, Kansas, enquires as to "power of national banks to take mortgages of land," and specially "would such mortgage, *i. e.*, a mortgage taken by a national bank to secure the payment of a contemporaneous loan, be void as against a subsequent mortgage taken expressly subject to it." The case of Kansas Valley Nat. Bank v. Rowell, 2 Dillon, C. C. p. 374, decides that under §§ 8 and 28 of the National Banking Act, a mortgage to secure a contemporaneous loan, is clearly unauthorized and invalid,—also see cases cited at end of opinion. It seems to me that a subsequent mortgage given to another party who could legally take it, expressly subject to this *invalid* mortgage, would not tend to complicate matters. The bank has no *power* to hold such a mortgage, and when the facts are made to appear, the mortgage is *void*, and ceases to have any effect as a prior security—and the facts may be shown as well in the case suggested, as the fact that a prior mortgage has been paid off, when a subsequent mortgage has been taken expressly subject to it. G.

Legal News and Notes.

—HOW CRIME DEFIES LAW.—The legislative committee now engaged in the investigation of crime in New York was not needed to prove that the police and the officers of our courts and prisons are in constant collusion with the men it is their duty to punish; but the investigation is making that which was well known in the abstract notorious in the concrete. Yesterday some very interesting cases were examined. As one of the witnesses said, "Any man with money might feel pretty sure of getting away." When the committee reports, it will have a tale to tell of justice in New York which will horrify the whole country.—[*N. Y. Herald.*

—ADMISSIONS TO THE BAR.—A large class was examined for admission to the bar last week, at Ottawa, and several of the applicants rejected. It is a fact worthy of mention, that in the class there was one woman and a colored man. The colored man failed to pass. Miss Mary Perry was more successful. One of the examiners, who is not noted for being a woman's rights man, informed us that she took the court, the examiners and the bar by surprise, and passed by far the best examination of any member of the class. Miss Perry is polite and lady-like in her manners, and so conducts herself as to gain the respect of all who make her acquaintance. She has been a thorough student, and enters upon the practice of law with a good knowledge of the principles upon which it is founded. Miss Perry will honor the profession, and being a lawyer, will be none the less a lady. We know nothing of her intentions for the future, but we should like to see her connected with some one of the leading law firms in the city.—[*Chicago Legal News.*

—AS BEARING on the constitutionality of the proposed reform in procedure so as to allow less than twelve jurors to return a verdict, we would recall the fact that unanimity has not always been a characteristic of trial by jury. In ancient times verdicts were often taken according to the voice of the majority, or, as it was termed, "*ex dicto majoris partis.*" 2 Hale's P. C. 297; Fitz. Ab. Verd. 40; Bro. Ab. Jurors, 53. It appears also to have been in the power of the judge when there was a division of opinion among the jurymen to "afforce the Assizes," that is, to dismiss the minority and to substitute new jurors continually until a unanimous decision of twelve persons was obtained. 2 Glanville, c. 17; Fleta, 230; 4 Bracton, c. 19. However, in the reign of Edward III. it became settled by a solemn decision that a verdict by less than twelve jurors was nugatory (41 Ass. 11), and there seems to be a doubt whether the contrary rule ever prevailed. Fleta, 52. Barrington advanced the opinion that the causes leading to the requirement of unanimity in jurors were lenity to the prisoner in criminal cases, and the practice of attaints in civil cases. Observations on 29th chap. of Magna Charta.—[*Albany Law Journal.*

—TRESPASS BY ÆRONAUTS.—A decision of the Judge of the Hinckley County Court will teach æronauts that they have other dangers to fear than such as are directly traceable to the adventurous nature of their mode of travelling. An action of trespass was brought by a farmer in that court a few days ago, against an æronaut whose balloon had descended on one of the plaintiff's cornfields, causing damage to the extent of £5. Judgment was given for the whole sum claimed, although the damage was partly caused by persons following the balloon. In all such cases there can be no difficulty about the rule of law, and they will generally be found to resolve themselves into questions of fact. The law holds everyone liable for the direct and natural consequences of his acts. Hence, when a claim such as the above is made in any court, the real points to be determined are whether any damage had been caused, and if so, whether it is the direct and natural consequences of the defendant's act. In the case cited (Hume v. Oldaker, Starkie, 352) in support of the plaintiff's claim, a huntsman was held liable for damages caused by people following the hounds. But it was scarcely necessary as an authority. In future, æronauts must not forget that their dangers in the sky may be only exchanged for liabilities on the prosaic earth at the very moment when all their cares and anxieties seem to be at an end for the time.—[*The Law Times.*

—THE LATE JUDGE GROVER.—In the N. Y. Court of Appeals, 21st ult., the proceedings of the members of the bar of the city of New York, on the death of Judge Lewis B. Woodruff, were alluded to by Judge Davis. The following was also read by Chief Justice Church: "In the consultation room, Friday, September 17, 1875, the judges of the court of appeals, on coming together from the summer vacation, bring with them an abiding thought of the recent death of their late associate, the Honorable Martin Grover. In view of the public loss sustained by this sad event, and of their private sorrow thereat, they deem it proper to place upon the records of the court some estimate of his character and his career. His services as a judge were not of recent origin. In November, 1857, he was elected to the bench of the Supreme Court in the Eighth Judicial District, wherein he had assiduously pursued his profession of law almost from the date of his admission to the bar. In November, 1859, at the expiration of his first term of office, he was re elected. In that court he sat often as circuit judge on the trial of causes with the aid of a jury, and had opportunity for showing forth the peculiar faculties for that judicial duty which he possessed in a great degree. He was patient when patience was needed. He was of speedy discernment of the facts of the case and of the material issues involved."—[*Daily Register.*

—A NEW SERIES OF ENGLISH REPORTS.—The Incorporated Council of Law Reporting for England and Wales, have issued a prospectus on opening their subscription list for 1875, which is in many respects, a rather remarkable document. Beginning with the announcement that the important changes made by the Judicature Acts, have induced the council to wind up the current series of the Law Reports with the present year, 1875, and to commence a new issue with the year 1876, the prospectus proceeds to unfold the arrangement of "the plan of reporting under the new legislation." The plan when unfolded, seems to be, to go on very much as before. The reports of the 1st or Chancery Division are to be kept separate; so are the reports of the 5th Division, which embraces the Probate, Divorce, and Admiralty business, and, "as each of the 2d, 3rd, and 4th Divisions, that is to say, the Queen's Bench, Common Pleas, and Exchequer Divisions, has exclusive jurisdiction given it over certain branches of business, and as each division will furnish matter enough for one volume of reports a year," there are to be separate volumes for each of these divisions. So far, the plan has not developed any very striking novelty, but we now come to a slight change in the old arrangement. In the words of the prospectus, "the whole of the intermediate appeals, will be distributed among the volumes of the courts of first instance upon a uniform plan, and there will be no separate volume of reports in respect of her Majesty's Intermediate Court of Appeal." In other words, the council have determined to adopt the method now practiced by them with respect to the Exchequer Chamber cases, and not that applied to the decisions of the Court of Appeal in Chancery. This determination is not without its drawbacks, as it will be impossible to tell from the reference of a case whether it bears the stamp of the Court of Appeals, or is merely a decision of a court of first instance. In order to avoid the clumsy system of odd parts, the Crown Cases Reserved are to go into the Queen's Bench Division, and one volume to be cited, under the appropriate style of "Misc. Div." (*i.e.*; Miscellaneous Division), is to comprise Probate, Divorce, and Admiralty cases, the Ecclesiastical cases in the Court of Arches, and the Admiralty and Ecclesiastical appeals to the Privy Council. The Bankruptcy cases are to be mixed with the cases in the Chancery Division. "As the appellate jurisdictions of the Privy Council and the House of Lords are to be continued for the present, the reports of the cases before those tribunals will be published as hitherto," with this alteration, that the Privy Council cases (except, we suppose, those to be given in the "Misc. Div."), the English, Scotch, and Irish appeals, and the Divorce appeals, are all to be crammed into the same volume. These changes may do away with the nuisance of odd parts, but the removal of this nuisance, will be dearly bought by the majority of practitioners who never find it necessary to consider Scotch or Divorce appeals, and very rarely Privy Council cases. The prospectus concludes with an intimation that a consolidated digest of the Law Reports, down to the end of 1875, will be issued in 1876, which, unlike the digests which the subscribers had grown accustomed to expect, will not be supplied to them without payment.—[*The Solicitor's Journal.*